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Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
Petitioners,

v.

WALMART STORES, INC. *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To grant a motion for class certification pursuant to Federal Rule of Civil Procedure 23(b)(3), the court is required to "find[]" that common questions predominate and that a class action will be manageable. The question presented in this petition is:

Whether, under Rule 23(b)(3), a court can certify a class (a) based solely on its determination that the plaintiffs have presented evidence of predominance that is not "fatally flawed" or "inadmissible as a matter of law," without actually deciding that common questions of fact predominate, and (b) without actually deciding whether the action will be manageable because identified manageability problems caused by the certification can be addressed later by modifying the certification or decertifying the class. App. 22a.

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

The Limited, Inc.
Sears Roebuck & Company, Inc.
Safeway Inc.
Circuit City Stores, Inc.
National Retail Federation
Food Marketing Institute
International Mass Retail Association
Bernie's Army-Navy Store
Auto-lab of Framington Hills
Burlington Coat Factory Warehouse Corporation
Sportstop, Inc.
Payless ShoeSource, Inc.
Shoes, Etc., Inc.
The Coffee Stop, Inc.
UCC Kwik Doc, Inc.
Computer Supplies Unlimited
Denture Specialist, Inc.
Geneva White D.M.D.
Scrub Shop, Inc.
53, Inc.

and all similarly situated persons.

Neither petitioner has a parent corporation or issues stock; and, thus, no publicly held corporation owns 10% or more of petitioners' stock.

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PETITION FOR CERTIORARI

Petitioners, Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-55a) was entered on October 17, 2001, and is reported at 280 F.3d 124 (2d Cir. 2001). The order denying petitioners' petition for panel rehearing and rehearing en banc (App. 101a) was entered on December 4, 2001, and is not reported. The order granting petitioners' motion for appeal of the district court's order granting class certification pursuant to Fed. R. Civ. P. 23(f) (App. 99a-100a) was entered on June 6, 2000, and is not reported. The opinion and order of the United States District Court for the Eastern District of New York granting class certification (App. 56a-98a) was entered on February 22, 2000, and is reported at 192 F.R.D. 68 (E.D.N.Y. 2000).

JURISDICTION

The court of appeals granted review of the district court's decision and order certifying a class pursuant to Fed. R. Civ. P. 23(f), and entered its opinion and judgment on October 17, 2001. Petitioners filed a timely petition for panel rehearing and rehearing en banc. That petition was denied on December 4, 2001. On February 22, 2002, Justice Ginsburg granted petitioners' application to extend the time for filing the petition to April 3, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .
>
> . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

INTRODUCTION

The certification of a large class "may so increase the defendant's potential damages liability and litigation costs" that he will be coerced to settle a case without regard to the merits of his defense. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). What Judge Jacobs in his dissent below aptly characterized as the "brutally coercive" nature of class certification makes it critically important for district courts to resolve correctly and with some measure of finality whether the prerequisites of class certification exist. App. 36a. "Coercion" is, if anything, an understatement for a class such as the one proposed in this case of four million members seeking damages of approximately $100 billion. This is why Rule 23(b)(3) authorizes class certification only if, after a "rigorous analysis," the district court "finds" that the prerequisites for certification have been met and that the class action can be managed without impairing any party's substantive rights. *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Accordingly, several courts of appeals have required the district courts to adjudicate all factual and legal disputes in deciding whether Rule 23 has been satisfied. In contrast, the Second Circuit declined to follow that approach in two fundamental respects.

First, the court of appeals held that a district court is forbidden to resolve competing evidentiary submissions on issues overlapping with the merits of a case when ruling on class certification and should instead certify the class so long as the plaintiffs' proof in support of certification is merely admissible. App. 11a-12a. Seemingly fearful of probing too deeply into the merits in making class certification decisions, the court of appeals refused to permit an inquiry that would have determined whether common issues actually predominate. In so doing, the court of appeals condoned the district court's abdication of its responsibility as the sole trier of fact on the class certification decision and authorized class certification whenever the plaintiffs proffer colorable or

admissible evidence in support of the class requirements. See *id.* The court's misconception of how Rule 23 is to be applied directly conflicts with the decisions of other courts of appeals. For example, as the Seventh Circuit recently observed:

> A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives. [*West* v. *Prudential Sec., Inc.*, 2002 WL 378158, at *3 (7th Cir. Mar. 7, 2002) (Easterbrook, J.).]

See also *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001); and cases cited *infra* at 16-17. In addition, the Second Circuit's holding is in substantial tension with this Court's repeated instruction that district courts should conduct a "rigorous analysis" before certifying a class. *Falcon*, 457 U.S. at 161; see also *Coopers*, 437 U.S. at 473.

Second, the court of appeals held that a district court may certify a class, despite the existence of acknowledged manageability problems, without determining whether or how the class action can be managed. The court approved the district court's decision to postpone to some future date any decision as to whether individual damages determinations for four million retailers would render the action unmanageable. This holding, like the first one, conflicts with the language and structure of Rule 23. Moreover, it conflicts with numerous other courts of appeals' determinations that "where the court finds, on the basis of substantial evidence . . . that there are serious [manageability] problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found." *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc) (emphasis omitted). Certifying a class and allowing it

to proceed toward trial without resolving whether the prerequisites for class certification actually exist brings the full coercive force of class certification to bear on defendants without the countervailing protection of a rigorous determination that class treatment is in fact warranted.

These mature conflicts among the courts of appeals warrant review. The need is amplified, moreover, by the important and recurring nature of the issues presented. Class actions have significant ramifications both for litigants and the litigation process. Thousands are filed each year, and many, including this case, allege huge damages. The very existence of such aggregated claims can have dramatic untoward effects on business strategies and policies. Simply stated, the effect of certification can be devastating. This case provides an excellent vehicle for this Court to clarify the standards of Rule 23; and accordingly, the Court should grant the petition.

STATEMENT OF THE CASE

1. Petitioners Visa and MasterCard are associations of thousands of member financial institutions. Petitioners neither issue payment cards to consumers nor sign up merchants to accept those cards. Instead, they license their members to issue cards under their respective brands and to sign up merchants to accept those cards. These members independently, and in competition with one another, establish the terms on which their cards are offered to consumers and accepted by merchants. *National Bancard Corp. (NaBanco)* v. *Visa U.S.A. Inc.*, 779 F.2d 592, 594-95 (11th Cir. 1986).

Petitioners establish the rules that govern the operation of their respective financial networks. These rules are designed to effectuate two essential principles: guaranteed acceptance and guaranteed payment. Cardholders know that they can use their cards to purchase goods or services at any location worldwide displaying the MasterCard logo or Visa flag. Merchants know that, so long as they follow the rules

governing authorization and verification, payment for a purchase made with a MasterCard or Visa card is guaranteed.[1]

To effectuate these dual guarantees, petitioners always have insisted that merchants who agree to accept petitioners' cards accept all properly-presented MasterCard or Visa cards, without regard to who issued the card or the terms on which it was issued to the cardholder. This "Honor All Cards" rule is critical to the proper functioning of the MasterCard and Visa payment systems. See *id.* at 602 (universality of acceptance is a key element of a national payment system). Virtually all competing payment systems, including American Express, Discover and the regional ATM networks, impose similar requirements.

Petitioners' "Honor All Cards" rules do not preclude merchants from accepting alternative forms of payment or encouraging ("steering") customers to pay by other means. Each merchant can choose to accept some or all of a variety of payment forms, including cash, checks, American Express, Discover, Visa, MasterCard and regional ATM cards.

Debit cards generally access a consumer's checking or savings account ("depository accounts") to satisfy the payment obligation incurred by a purchase. A consumer can access her depository account for such direct payment by either "off-line" or "on-line" purchase transactions. Visa and MasterCard-branded debit cards are "off-line debit cards," that is, they can function at the point of sale in precisely the same manner as defendants' branded credit cards, operating on the electronic systems already in place for accepting credit cards and generally requiring a signature to complete a

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[1] This guaranteed payment, which includes the transfer of funds from the issuing bank to the bank acquiring the merchant's receivables, is part of the system known as "interchange." An "interchange fee" is charged to the acquiring bank for the benefit of the issuing bank, which guarantees payment for transactions on its cards and bears both the float cost and the risk of fraud or nonpayment. *See NaBanco*, 779 F.2d at 595.

transaction. "On-line" debit transactions, by contrast, are akin to ATM card transactions, which require entry of a Personal Identification Number ("PIN") at the point of sale. Merchants that choose to accept "on-line" debit cards, therefore, must install specialized electronic terminals, known as "PIN pads" at their stores.

In this case, plaintiffs contend that the "Honor All Cards" rule is an unlawful tying arrangement and, in addition, is the mechanism by which petitioners allegedly have attempted and conspired to monopolize a putative market for debit card payment services. In their complaint, plaintiffs allege that if MasterMoney and Visa Check were not tied to their respective credit cards by the "Honor All Cards" rule, retailers would refuse to accept off-line debit payments, and that, as a consequence, petitioners would have been forced to lower their interchange rates. Plaintiffs claim that post-trebling damages approach, or even exceed, $100 billion; and they also seek an injunction prohibiting petitioners from enforcing their respective "Honor All Cards" rules.

2. Pursuant to Fed. R. Civ. P. 23(b)(3), plaintiffs moved to certify a class consisting of "'all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore are required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements, during the fullest period permitted by the applicable statutes of limitations.'" App. 5a. That proposed class consists of an estimated four million members ranging from such retailing behemoths as Wal-Mart, Sears Roebuck and The Gap to the smallest corner grocery and neighborhood pharmacy.

In support of their class motion, plaintiffs proffered an expert report from Professor Dennis Carlton, a well-credentialed Ph.D. in economics. Petitioners offered their own expert report from Dean Richard L. Schmalensee, of MIT, also a well-respected scholar in economics.

In opposing the motion for class certification, MasterCard and Visa made two principal arguments: First, that common issues could not predominate as required under Rule 23(b)(3), because both injury-in-fact and damages mitigation would have to be individually determined; and second, that the class could not be managed without sacrificing petitioners' substantive rights. The district court rejected both arguments.

A critical element of the court's analysis was its legal ruling that "a 'weighing of the evidence is not appropriate at [the class] stage of the litigation,'" App. 87a:

> In this preliminary stage of the case, I am very far from the "trier of fact" contemplated in [Federal Rule of Evidence] 702. Indeed, I am expressly forbidden from engaging in "a preliminary inquiry into the merits" of the case. In particular, a court at the class certification stage should not delve into the merits of an expert's opinion, or indulge "dueling" between opposing experts. [*Id.* at 68a (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999)).]

Thus, the district court held that, although "a court could [not] certify a class (in this case of approximately four million members) on the basis of an expert opinion so flawed that it is inadmissible as a matter of law," *id.* at 68a-69a, it was not permitted to *decide* whether an expert is correct or incorrect in asserting that the issue of injury-in-fact can be decided on a class-wide basis. Even where, as here, "the proffered common theory of injury is 'likely to be extremely difficult to prove,'" *id.* at 87a (quoting *Caridad*, 191 F.3d at 291), the court held that the class should be certified so long as the plaintiffs "have offered both empirical and theoretical support of their claim." *Id.* at 86a. See *id.* 87a (citing with approval authorities stating that class certification should be granted if the "assertion of class status is at least colorable").

The court stated that the plaintiffs' expert, Professor Carlton, had put forth a theory that "in the 'but-for,' untied world, after large numbers of merchants refused off-line debit cards, Visa and MasterCard would have cut their interchange fees [for all retailers] in order to preserve universal acceptance." App. 82a. Under this theory, the court hypothesized, each class member's damages could be calculated simply by measuring the overcharge it paid on all the MasterMoney and Visa Check transactions it accepted.

The court recognized that MasterCard and Visa had presented evidence that challenged both the logic and the application of Carlton's theory on numerous grounds. App. 81a-84a. Nonetheless, despite petitioners' challenge to plaintiffs' expert testimony in support of the claim of common injury-in-fact for all class members, the trial court refused to resolve this question before certifying the class. Instead, it held that for purposes of the class certification motion, and "taking into account that a 'weighing of the evidence is not appropriate at this stage in the litigation,'" *id.* at 87a, plaintiffs had made a sufficient showing that common issues would predominate to support class certification, *id.*

The court also acknowledged that petitioners had raised a substantial mitigation defense — specifically, a claim that any merchant that did not like off-line debit cards could, and often did, "steer" a significant portion of its customers to other forms of payment. Petitioners, thus, observed that the injury to merchants who did not steer was not caused by the alleged unlawful conduct or, in the alternative, that such merchants had failed to mitigate their damages. To resolve these mitigation issues, of course, would involve individual inquiries into the circumstances and behavior of particular merchants. The court recognized that the need for individual damages determinations may bar class certification on both predominance and manageability grounds, particularly where, as here, the class numbers in the millions. App. 91a n.19. Yet the court declined at this stage of proceedings to decide

whether such individual determinations would be required. See *id.* Rather, the court concluded:

> "[i]f factual or legal underpinnings of plaintiffs' successful class certification motion are undermined once they are tested under a more stringent standard than *Caridad* allows, a modification of the order, or perhaps, decertification, might then be appropriate. The same would be true if it appears that individual damages issues will come to overwhelm common questions in a class maintained under Rule 23(b)(3)." [*Id.* at 97a.]

3. Acting upon the recommendation of the district court that its class ruling be considered under newly adopted Rule 23 (f), Fed.R. Civ. P., petitioners sought interlocutory review, which was granted by the Second Circuit. A sharply divided panel of the court of appeals affirmed the class certification decision, essentially on the grounds stated by the district court.

The majority first observed that "'a motion for class certification is not an occasion for examination of the merits of the case.'" App. 11a (citing *Caridad*, 191 F.3d at 291). It then approved the district court's deferential approach to plaintiffs' proof, holding that so long as the expert testimony is not "'fatally flawed'" or "so flawed that it would be inadmissible as a matter of law," it suffices to support certification. *Id.* See *id.* at 11a-12a (approving class certification where plaintiffs have "'a reasonable probability'" or a "'colorable method'" or a method that is not "'so insubstantial as to amount to no method at all'" for establishing their claims by common proof).

The court further rejected the dissent's assertion that if the district court had decided, as it was required to do, how injury-in-fact and the extent of damages would be proven in this case, the district court would have been confronted squarely by conflicts among class members and the inadequacy of their representation. App. 25a-30a. The court

of appeals recognized the conflict among the courts of appeals on the proper legal standard for tying injury and damages, but upheld the district court's decision not to resolve that conflict before certifying the class. *Id.* at 25a-27a. The court held that plaintiffs' expert's opinion was that a merchant would suffer injury-in-fact under either theory and that since that expert opinion was not "fatally flawed," the court did not have to address the issue by resolving conflicts between the Carlton and Schmalensee opinions. *Id.* at 26a-27a. Finally, the court held that, if a conflict among class members were subsequently to develop, it could be addressed with bifurcation, decertification or subclasses. *Id.* at 30a.

The court then separately considered whether petitioners' mitigation defense meant that common issues did not predominate or that the class would be unmanageable. The court first held that common issues may predominate even when there are individualized damages issues and that, based on the theory of plaintiffs' expert, there were more common issues than individualized issues here. App. 20a-21a. The court also rejected the argument that mini-trials on damages would render the case unmanageable, pointing out that the trial court could address these issues at a later stage by bifurcating liability and damages trials, appointing a special master, decertifying the class after the liability trial, or creating subclasses. *Id.* at 22a (citing Fed. R. Civ. P. 23(c)(4)).

Judge Jacobs dissented. In his view, the court "inadequately considered whether the class action can be manageably tried and has certified [a] four million member class without identifying a 'practical means' for calculating the extent of each merchant's damages." App. 36a (emphasis omitted). He explained that the court must affirmatively determine that the case, if tried, would not present intractable management problems. Judge Jacobs pointed out that the district court had acknowledged that petitioners' mitigation defense may "'have force,'" *id.* at 39a; he therefore concluded

that the "crucial, unresolved difficulty in this litigation concerns individualized proof of damages" for the four million class members. *Id.* at 38a.

The dissent further observed that the majority's justification for the failure to decide manageability with "the conditional nature of the certification" was "cold comfort for the defendants [because] the brutally coercive effect of the certification cannot be stayed." App. 36a. Moreover, the dissent noted, this approach conflicted with that taken by several other circuits which have held that "individual questions 'must be resolved before a class is certified, even if certification is conditional.'" *Id.* at 40a (emphasis omitted) (citing *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc)).

The dissent also argued that the district court improperly failed to address the correct standard for determining injury in a tying case. Under the so-called "package" method — which, Judge Jacobs claimed, was the proper approach, App. 48a — class members would face "irreconcilable conflicts in proving the fact and extent of any injury caused by the tie." *Id.* at 43a. The dissent further noted that where, as here, the plaintiffs used the tying and tied products in different proportions, different plaintiffs will have conflicting interests in how the class goes about proving the fact that they would have paid less for their particular package and the extent to which they would have paid less. *Id.* at 51a-54a.

As a result of the improper certification, Judge Jacobs concluded, "the only case management tool that will bring about th[e] end [of this case] will be settlement . . . coerced by abuses that Rule 23(f) was specifically designed to correct." App. 55a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION EXACERBATES CONFLICTS AMONG THE COURTS OF APPEALS ON THE STANDARDS FOR CLASS CERTIFICATION.

The certification of a large class necessarily has coercive effects on defendants that are largely independent of the merits of the underlying litigation. See, *e.g.*, Advisory Comm. Notes, Fed. R. Civ. P. 23. For that reason, it is critically important that the class certification decision be correct. Under Rule 23, the importance of a correct class certification decision is reflected in the "rigorous analysis" which must precede such certification, see *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 161 (1982).

Under the process established by Rule 23, resolution of class certification issues is vested in the district court, which serves as the sole trier of fact for purposes of deciding whether the conditions for class certification have been fulfilled. The court may not certify a class unless, after employing the rigorous analysis mandated by *Falcon*, it "finds," *inter alia*, that common questions predominate and that the action would be manageable on a class basis. See Fed. R. Civ. P. 23(b)(3); *Falcon*, 457 U.S. at 161. "[A]ctual, not presumed, conformance with Rule 23[] remains . . . indispensable." *Id.* at 160. See also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978). The inquiry into whether the Rule 23 conditions have been fulfilled, as well as the type of questions which need to be resolved in the course of that inquiry, are independent of the substantive merits of the plaintiffs' claim, although the two obviously will overlap in many instances.

The language and structure of Rule 23 and this Court's decisions, accordingly, require trial courts actually to determine whether the prerequisites for class certification have been met and to do so *before* certifying a class. These

requirements leave no room for the Second Circuit's rulings — (a) that a district court may find the prerequisites to class certification satisfied, and thus certify a class, simply because the plaintiffs have presented evidence that is not "'fatally flawed'" or "'so insubstantial as to amount to no method at all'" or "'inadmissible as a matter of law,'" App. 11a-12a; and (b) that a district court may certify a class while postponing the decision whether damages mini-trials would render a class action unmanageable. *Id.* at 23a. Both of these holdings broaden mature conflicts among the lower courts that warrant this Court's review.

A. The Courts of Appeals Are In Conflict Concerning Whether A District Court Must Decide Whether The Prerequisites for Class Certification Exist If Those Determinations Overlap With the Merits of Plaintiffs' Claims.

1. As set forth above, the Second Circuit does not require a district court to find that class certification is justified based upon a full analysis of the evidence and arguments put forward by both sides. Instead, it is enough that the plaintiff proffers admissible evidence sufficient to support a claim, for example, that common issues will predominate. See *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 155-56 (2d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3429 (U.S. Mar. 18, 2002) (No. 01-908); *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). The Tenth Circuit also has held that it was improper for the district court to "ma[k]e findings" on commonality and predominance issues that overlapped with the merits, because those findings "encompasse[d] factual issues relevant to [the] trial." *Thiessen* v. *General Elec. Capital Corp.*, 267 F.3d 1095, 1100 (10th Cir. 2001), *cert. pending*, 70 U.S.L.W. 3410 (U.S. Dec. 14, 2001) (No. 01-881).

Other courts of appeals have adopted a directly conflicting approach. As shown below, they require a trial court addressing a Rule 23 motion for class certification to follow a

procedure analogous to that under Rule 12(b)(1) or (2), where the trial court is the trier of fact and makes all factual findings necessary to decide jurisdiction or venue. Under this approach, the trial court — as *the* trier of fact *as to these issues* — must resolve any factual or legal questions necessary to its determination of jurisdiction or venue. The same is true, perforce, under Rule 23 which, by its express terms, contemplates a "find[ing]" that the conditions prerequisite to certification have been met. That structure, by definition, implies an active adjudicatory role in which *both sides' evidence* is considered equally and fully.

Most recently, in *West* v. *Prudential Securities, Inc.*, 2002 WL 378158 (7th Cir. Mar. 7, 2002), a case strikingly similar to this one, the Seventh Circuit reversed the decision of a district court that had certified a class because "each side ha[d] the support of a reputable financial economist . . . and thought the clash enough by itself to support class certification and a trial on the merits." *Id.* at *3. The court condemned this decision as "a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *Id.*

Similarly, in *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001), the Seventh Circuit reversed a class certification, holding categorically that "[b]efore deciding whether to allow a case to proceed as a class action, . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. In words pertinent here, the court continued:

> And if some of the considerations under Rule 23(b)(3), such as "the difficulties likely to be encountered in the management of a class action", overlap the merits — as they do in this case, where it is not possible to evaluate impending difficulties without making a choice of law, and not possible to make a sound choice of law without deciding whether [the defendant] authorized or ratified

> the dealers' representations — then the judge must make a preliminary inquiry into the merits. [*Id.*]

Moreover, the court recognized that the standard applicable in deciding motions for certification under Rule 23 is analogous to that applicable in deciding motions to dismiss for lack of jurisdiction, improper venue, application of *forum non conveniens*, and other preliminary issues under Rules 12(b)(1) and (2). "When jurisdiction or venue depends on contested facts — even facts closely linked to the merits of the claim — the district court is free to hold a hearing and resolve the dispute before allowing the case to proceed." *Id.* at 676-77. Thus, the Seventh Circuit concluded, "[b]oth the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's [class] allegations." *Id.* at 677. See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995).

The Third Circuit has expressly embraced the Seventh's Circuit's approach. In *Johnston* v. *HBO Firm Management, Inc.*, 265 F.3d 178 (3d Cir. 2001), the court of appeals agreed that "'before deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23.'" *Id.* at 188. Applying the *Szabo* framework, the Third Circuit held that "it is apparent that not only was it appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision," *id.* at 189, and that it would have been inappropriate to certify the class. *Id.* at 190, 194. See also *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (3d Cir. 2001) (holding that "'[b]efore deciding whether to allow a case to proceed as a class action, . . . [courts] should make whatever factual and legal inquiries are necessary under Rule 23"; rejecting expert testimony that the putative class would be entitled to a rebuttable presumption of economic loss; and therefore

holding that common issues did not predominate) (omission and second alteration in original).

Like the Seventh and Third Circuits, the First and Fifth Circuits have required trial courts to make all legal and factual determinations necessary to decide whether a plaintiff has proven that the prerequisites to class certification are satisfied. See *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 297-99 (1st Cir. 2000) (rejecting the argument that the trial court had committed legal error by considering the merits of a case in deciding a motion for class certification and stating that "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (holding that "[a] district court certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met" and that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues"). Cf. *Stastny* v. *Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 n.12 (4th Cir. 1980) ("*Eisen* cannot of course be read to forbid any pre-trial inquiry designed to establish the class action criteria that happens to touch on matters that may also relate to the merits of the class or individual claims as alleged.").

In sum, the Second and Tenth Circuits and many district courts[2] have concluded that the standards for granting class

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[2] Several district courts have adopted these or even more lenient standards for deciding motions for class certification. *See, e.g., In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 (M.D. Fla. 1996) (certifying class, because the expert evidence "demonstrated at least a 'colorable method' of proving impact at trial" and leaving for the jury the question whether "there has been a common impact"); *O'Connor* v. *Boeing N. Am., Inc.*, 184 F.R.D. 311, 324 n.16, 329, 330 (C.D. Cal. 1998) (refusing to "engage in a 'battle of the experts' at this stage of the litigation" because there was "some evidence" that the plaintiffs' class

certification are lenient and require a plaintiff only to present colorable or admissible evidence in support of class allegations. This approach stands in stark contrast to that taken by other courts of appeals, which require that the plaintiff actually demonstrate that the prerequisites to class certification are met. The breadth and depth of the conflict on this critically important and oft-recurring question of law by itself warrants certiorari review.

2. There is an additional basis for certiorari review of this issue. A common thread that runs through virtually every lower court decision adopting the deferential class certification standard of review is language in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

In *Eisen*, the trial court had held that a defendant should bear 90% of the cost of providing notice to absent class members, because the plaintiff was more than likely to prevail on the merits of his claims. This Court reversed, holding that "nothing in either the language or the history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. Numerous lower courts have misinterpreted this language to bar them from going beyond the allegations of the complaint in deciding a class certification motion. See, *e.g.*, *Szabo*, 249 F.3d at 675 (citing cases); *In re Potash Antitrust Litig.*, 159 F.R.D. 682,

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definition was reasonable and because to do so would require the court to "make an impermissible preliminary inquiry into the merits of Plaintiffs' claims"). *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 30 (N.D. Ga. 1997) ("[t]he Court notes that the [expert] evidence relied upon by the Court in this [class certification] Order has not been subjected to the adjudicative process, and will in no way 'color the subsequent proceedings and place an unfair burden on the defendants'") (alteration in original omitted); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995) ("[t]his case presents the familiar 'battle of the experts.' The certification stage of this litigation is not, however, the proper forum in which to resolve this battle" because the "proposed methods are [not] so insubstantial as to amount to no method at all").

688 (D. Minn. 1995) (citing cases); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 504 (S.D.N.Y. 1996) (citing cases). And many other courts, including the Second Circuit, have incorrectly interpreted this language to bar them from deciding any factual or legal question that overlaps with a merits determination in ruling on a class certification motion. See *supra* at 14, 17 & n.2.

Post-*Eisen* opinions of this Court are wholly inconsistent with this interpretation of *Eisen*. In *Coopers*, this Court stated that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" and that "'[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.'" 437 U.S. at 469 n.12. In fact, the "more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits [of the claims than Rule 23(a) determinations]." *Id.* Subsequently, in *Falcon*, the Court again recognized that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. at 160. See also *Szabo*, 249 F.3d at 677 ("nothing in . . . *Eisen*[] prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in [Rule 23] and exercise the discretion it confers").[3]

Coopers and *Falcon* are best read to require courts deciding class certification motions to resolve all necessary factual disputes, including those which overlap with merits issues.

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[3] *See also Waste Mgmt. Holdings*, 208 F.3d at 298 ("*Eisen*, fairly read, does not foreclose consideration of the probable course of the litigation at the class certification stage"); *Castano*, 84 F.3d at 744 ("[t]he district court, based on [*Eisen*], believed that it could not go past the pleadings for the certification decision. The result was an incomplete and inadequate predominance inquiry").

Moreover, both the language and the structure of Rule 23 would seem to dictate that approach. However, this Court has not explicitly delineated the nature of the judicial inquiry required, or even permitted, when conducting a "rigorous analysis" of the Rule 23 issues, nor has it specifically addressed the extent to which lower courts considering motions to certify may probe the details of a plaintiff's claim where necessary to resolution of the class certification issues. Put otherwise, the Court has not stated whether the district court must — as trier of fact for Rule 23 purposes — resolve factual disputes or should determine only whether there is a genuine dispute as to material facts. That omission, in conjunction with the language in *Eisen*, has caused many courts, including the Second Circuit, to limit significantly the scrutiny of evidence bearing on the prerequisites to class certification. See Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include An Assessment of the Merits*, 168 F.R.D. 366, 392 (1996) (the tension in the Supreme Court's opinions has caused confusion and calls for clarification by the Court).

This error and the associated conflict can only be resolved by this Court. Thus, the Court should grant the petition not only to resolve the conflict, but also to clarify the relationship of *Eisen* to *Falcon* and *Coopers* and to ensure uniformity among the lower courts.

B. The Courts of Appeals Are In Conflict Concerning Whether A District Court Must Decide Prior to Class Certification Whether The Action Will Be Manageable.

The Second Circuit also affirmed the trial court's decision not to determine whether this action is manageable on a class basis, particularly in light of the foreseeable need for individual damages determinations. App. 91a n.19. Numerous courts have held that where, as here, millions of individualized damages determinations will be necessary, common issues do not predominate, and a class action would

be unmanageable.[4] The trial court declined to decide whether such individual determinations would be required at this stage of the proceedings, saying that "[i]t may well be appropriate to address before trial the merits of some of defendants' damages-related arguments and whether, upon resolution of those issues, there remains a 'practical means' to litigate the damage claims of class members." *Id.* at 92a n.19. The court of appeals then held that the possibility of individual damages trials did not render the class unmanageable per se; that the district court had pointed out that it could either bifurcate the trial or decertify the class; and therefore that "the district court adequately considered how it would address any individualized issues that might arise in th[is] case." *Id.*

This holding, like the court of appeals' first holding, conflicts with the plain language of Rule 23 and with this Court's decisions that a trial court cannot certify a class unless the court undertakes the necessary analysis to determine if the plaintiff has proven that the prerequisites to class certification are satisfied. Interpreting Rule 23 to allow class certification while postponing the manageability determination enhances the most undesirable consequence of certification – its potential to coerce settlements unrelated to the merits of the underlying claims. Rule 23 requires the trial court to conduct a rigorous analysis and to make

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[4] *See Rutstein* v. *Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239-40 (11th Cir. 2000), *cert. denied*, 532 U.S. 919 (2001); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998); *Burrell* v. *Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 290-91 (E.D. Tex. 2000) (denying class certification under Rule 23(b)(3) because of individual damages issues); *Shelley* v. *AmSouth Bank*, 2000 WL 1121778, at *7 (S.D. Ala. July 24, 2000) (same), *aff'd*, 247 F.3d 250 (11th Cir. 2001) (unpublished table decision); *In re Beef Indus. Antitrust Litig.*, 1986-2 Trade Cas. (CCH) ¶ 67,277, at 61,414 (S.D. Tex. 1986) ("the issue of damages does not lend itself to such a mechanical calculation, but requires separate 'mini-trials' of an overwhelming large number of individual claims" and thus denying class certification as to price-fixing and attempted monopolization claims).

determinations of each of Rule 23's requirements in order to increase the likelihood that certification decisions will be correct.

Moreover, it is difficult to reconcile the Second Circuit's holding with the amendment to Rule 23 that authorizes interlocutory review of certification decisions. If a court can certify a class but postpone deciding whether Rule 23's prerequisites have been met, the court of appeals' interlocutory review is rendered superfluous. Accordingly, the only rule that is faithful to the policy permitting interlocutory review under Rule 23(f) is that the district court inherently abuses its discretion when it postpones deciding the manageability of the class.

This is why, as observed by Judge Jacobs, the decision below conflicts with the decisions of several other circuits. A court simply cannot postpone the predominance and manageability questions raised by a class of four million and still certify such a class. This is the logic behind the holdings of the Fourth, Ninth, Fifth, Third, and Sixth Circuits. See *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (1977) (en banc) ("where the court finds, on the basis of substantial evidence as here, that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found") (emphasis omitted); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (even conditional certification is improper unless plaintiffs have substantially satisfied the requirements of Rule 23); *Castano*, 84 F.3d at 742 (citing *Windham*, 565 F.2d at 70); *Newton*, 259 F.3d at 191 ("[p]laintiffs maintain their expert can devise a formula for calculating injury and damages that will allay manageability concerns. Yet we are hesitant to rely on a formulaic nostrum given the consequences if it fails to meet expectations"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1088 n.21 (6th Cir. 1996). Cf. also *Falcon*, 457 U.S. at 160 ("actual, not presumed, conformance" with Rule 23 is required).

Here, the district court simply brushed aside one of the requirements of Rule 23(b)(3) by stating that it could return to the manageability question at some unknown future date. Yet, however difficult it may have been to decide whether individual damages trials would be required that would thereby render the class action unmanageable, the court could not simply sidestep this pivotal issue — manageability is one of the prerequisites of class certification under the Rule. Cf. *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998) ("'[r]eading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3)'") (alteration in original). The Second Circuit's decision to permit postponement of the substantial manageability question and nonetheless allow the class to be certified is in conflict with decisions of several other courts of appeals and is incorrect. This Court should grant the petition and resolve the conflict.

II. THE CASE PRESENTS RECURRING QUESTIONS THE RESOLUTION OF WHICH ARE CRITICALLY IMPORTANT TO THE ADMINISTRATION OF JUSTICE.

There are thousands of class actions pending, and more than 3000 additional class actions are filed in federal district courts every year.[5] In each of these cases, trial judges must decide whether to certify a proposed class under Rule 23. To do so fairly and appropriately, those trial courts must know what a plaintiff is required to prove and what the court must find in order to satisfy the requirements of Rule 23. But it is precisely this question on which the federal courts are in conflict.

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[5] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html.

So long as there is uncertainty about this bedrock issue, it will frequently recur and consume scarce judicial resources, particularly in light of the availability of interlocutory appeal under recently added Rule 23(f), Fed. R. Civ. P. The certification of a class raises the stakes of litigation exponentially, and often determines whether a case will settle, be tried or simply disappear. Both district courts and courts of appeals will regularly confront the question presented here unless and until it is resolved by this Court.

The issue is also of the utmost importance to the litigation process and to the administration of civil justice in a wide variety of contexts. It is not an exaggeration to say that class actions have been the single most important development in civil litigation in the past 35 years. They touch virtually every area of substantive law from antitrust and securities, to employment, civil rights, mass torts and environmental damage actions. Frequently, they involve issues of enormous potential economic or social import, often calling into question the structure or operation of entire businesses or industries.

By its very nature, a class, once certified, creates enormous coercive pressure that may be largely independent of the underlying merits of the plaintiff's substantive claims. As the Advisory Committee on Procedures acknowledged in recommending interlocutory appeal of class certification decisions, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of ruinous liability." Advisory Comm. Notes, Fed. R. Civ. P. 23. See also *Manual for Complex Litigation (Third)* § 33.26 n.1056 (2000).

As an empirical matter, aggregation of claims makes it more probable that a defendant will be found liable and results in significantly higher damage awards. See *id.*; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *Judicature* 22 (1989). Thus, in addition to

skewing trial outcomes without regard to the merits of the dispute, class certification creates hydraulic pressure on defendants to settle. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 & n.85 (1995). Numerous courts have noted that, "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citation omitted). See also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense").

Given the unavoidably coercive character of class certification, it is particularly important that the class issue be resolved correctly and with all possible certainty. The only way effectively to serve those purposes is to require plaintiffs to prove that the prerequisites of class certification are fulfilled based upon an analysis of the relevant evidence and to require the district courts to resolve all pertinent issues, including manageability, prior to certification. The standards adopted by the Second Circuit undermine the Rule's purpose, for they place only minimal burdens on plaintiffs and allow difficult issues to be deferred while nonetheless bringing to bear on defendants the full coercive force of a certification order.

Whether certification under Rule 23(b)(3) is appropriate is most often decided on the issues of predominance and manageability. In the wide range of cases where class certification is pursued, defendants often attempt to demonstrate that plaintiffs' theories of classwide injury or classwide damages formulae do not work. If plaintiffs can counter such showings simply by proffering a contrary affidavit from a well-credentialed expert, the barriers to class

certification will be surmounted far too easily in cases where an inquiry that took fair account of each side's submissions would yield a contrary outcome. Similarly, if the question whether a mass trial is manageable can be postponed rather than decided, plaintiffs can and will use such "deferred" class certification to obtain unfair settlements without a trial. Thus, the application of a relaxed or delayed approach to class certification adopted below will have serious and widespread detrimental consequences in numerous class actions unless this Court intervenes.

Finally, the Federal Rules of Civil Procedure are intended to establish uniform treatment of all federal cases on matters that are procedural in nature. A lack of uniformity in the interpretation and application of these Rules is fundamentally unfair to litigants in class cases. Neither plaintiffs nor defendants should be confronted with less favorable rules depending upon whether a federal nationwide class action is brought in New York or Chicago. The current lack of uniformity simply encourages unseemly forum shopping by plaintiffs eager to leverage class certification into coercive settlements. This problem is particularly acute in the class action setting because plaintiffs often have limitless options as to where to bring the lawsuit. Thus, to permit materially conflicting standards to persist among the circuits unjustly provides plaintiffs with a one-way option to a more favorable set of rules on the availability of a class action. This is intolerable.

Rule 23 is a critically important procedural rule, not least because of the substantial, often determinative effect that decisions under that Rule have on the merits of important litigation affecting hundreds or, as here, millions of parties with claims alleged to involve tens of billions of dollars. A conflict concerning an important aspect of Rule 23's interpretation and application is particularly worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 3, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 00-7699

In re VISA CHECK/MASTERMONEY ANTITRUST LITIGATION.

WAL-MART STORES, INC., LIMITED, INC., SEARS ROEBUCK & COMPANY, SAFEWAY INC., CIRCUIT CITY STORES, INC., NATIONAL RETAIL FEDERATION AND THE FOOD MARKETING INSTITUTE, INTERNATIONAL MASS RETAIL ASSOCIATION, and All Similarly Situated Persons,

Plaintiffs-Appellees,

v.

VISA U.S.A. INC. AND MASTERCARD INTERNATIONAL INCORPORATED,

Defendants-Appellants.

Argued Feb. 5, 2001.
Decided Oct. 17, 2001.

Before JACOBS, SOTOMAYOR, Circuit Judges, and COTE, District Judge.*

Judge JACOBS, dissents in a separate opinion.

SOTOMAYOR, Circuit Judge:

Defendants-appellants Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard") appeal from an order of the United States District Court for the Eastern District of New York (Gleeson, *J.*) granting plaintiffs-appellees' ("plaintiffs") motion for class certification. We

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* The Honorable Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

hold that the district court did not abuse its discretion by finding that plaintiffs had established that this action is maintainable as a class action under Federal Rule of Civil Procedure 23(b)(3). We therefore affirm.

BACKGROUND

Plaintiffs—a number of large and small merchants and three trade associations—bring this antitrust class action against defendants Visa and MasterCard, alleging that defendants have created a tying arrangement in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by means of their "honor all cards" policy, which requires stores that accept defendants' credit cards to accept their debit cards as well. Plaintiffs also allege that defendants have attempted and conspired to monopolize the debit card market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

The underlying facts are drawn from plaintiffs' Second Amended Consolidated Class Action Complaint. Although Visa and MasterCard are separate associations, their rules permit "duality," which allows banks to be members of both associations and to issue both brands of credit cards. There is a 95 percent overlap between Visa's and MasterCard's memberships, and virtually every retailer that accepts one of defendants' credit cards also accepts the other's credit cards. Additionally, as a result of the duality policy, Visa and MasterCard coordinate many of their policies.

Visa and MasterCard, through member banks, issue different types of payment cards, including credit cards and debit cards. Member banks, called card-issuing institutions, rather than defendants themselves, issue payment cards to consumers and set the cardholders' interest rates and fees. Other member banks, called acquiring institutions, contract on behalf of Visa and MasterCard with retailers to accept their payment cards. When a cardholder makes a purchase with his or her Visa or MasterCard payment card at a merchant's store, the acquiring institution reimburses the merchant the purchase

price less a "discount fee" and the acquiring institution pays the card-issuing institution an "interchange fee."[1] The interchange fee is set by Visa and MasterCard, and the discount fee is based largely on the interchange fee.[2] Plaintiffs allege that, because of defendants' policy of duality, there is a high degree of uniformity in both the interest rates and fees charged by defendants' member banks to cardholders and in the discount rates charged by defendants' member banks to merchants accepting Visa and MasterCard payment cards.

This action centers around a class of debit cards issued by Visa and MasterCard. A debit card is an access device which enables a cardholder, among other things, to withdraw cash from his or her bank account at an automated teller machine and to make purchases at a point of sale ("POS") which are debited against the cardholder's bank account. POS debit

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[1] When a bank acts as both a card-issuing and an acquiring institution, it retains the entire discount fee.

[2] As the district court noted, the complaint includes the following illustration of the chain of transactions:

> Bank A issues a Visa credit card to Consumer X, who purchases a garment for $100 at Store Y, which was "acquired" for Visa by Bank B. Visa rules mandate that Bank B must pay Bank A an interchange fee of 1.25% of the amount of the transaction, *i.e.*, $1.25. Bank B will charge Store Y a "discount fee" higher than $1.25 in order to recover the mandated interchange fee and other fees that Visa rules mandate Bank B to pay Visa on each and every Visa credit card (and debit card) transaction and to earn a profit for itself. Thus, Bank B may charge a discount fee of 1.60% of the transaction amount (or $1.60) to Store Y. When Store Y presents Consumer X's $100 Visa transaction to Bank B, the bank will credit Store Y's account for $98.40, send the Visa mandated $1.25 interchange fee to Bank A and retain the $.35 balance of the "discount fee."

In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 72 n. 3 (E.D.N.Y.2000).

card transactions can either be "on-line" or "off-line." In an on-line debit card transaction, the cardholder enters his or her "personal identification number" ("PIN") into a PIN pad and then, during the retail transaction, the card-issuing institution verifies that there are sufficient funds in the cardholder's account and electronically puts a hold on the funds needed for the transaction. Within a day, the funds are moved from the cardholder's account to the retailer's account. In contrast, in an off-line debit purchase, the cardholder signs a slip authorizing the purchase (rather than entering a PIN), the card-issuing institution does not necessarily verify that there are sufficient funds or put a hold on those funds, and the funds take approximately one to seven days to be moved to the retailer's account. Plaintiffs contend that there is a higher incidence of fraud in off-line POS debit transactions because they are authorized by signature, rather than by PIN. Visa offers an off-line POS debit card called "Visa Check" and MasterCard offers one called "MasterMoney," both of which are the subject of this litigation.

Defendants have an "honor all cards" policy, which requires any merchant accepting any of their credit cards to accept all of their payment cards, including Visa Check and MasterMoney. According to plaintiffs, retailers are even prohibited by the defendants' "honor all cards" policy from asking customers whether they would mind using a different payment system. Defendants have set the interchange fees for Visa Check and MasterMoney at or near the same level as the interchange fees for their respective credit cards despite the fact that, according to plaintiffs, credit card transactions—which rely on the extension of credit—involve far more risk. The interchange fees for competing on-line debit cards—where the risk of non-payment is substantially eliminated—is far lower.

Plaintiffs contend that if Visa Check and MasterMoney were not tied to defendants' credit cards by the "honor all

cards" rule, retailers would refuse to pay the high Visa Check and MasterMoney fees, and as a result, defendants would have to lower those fees. Plaintiffs also allege that defendants have undertaken measures to deceive retailers into accepting their off-line debit cards. Specifically, plaintiffs contend that defendants designed their off-line debit cards to be indistinguishable from their credit cards by making them visually and electronically identical and by setting identical interchange fees for their credit and off-line debit cards.

Thus, plaintiffs allege that defendants have created an illegal tie between Visa Check and MasterMoney and defendants' credit cards and have attempted and conspired to monopolize the debit card market in violation of sections 1 and 2 of the Sherman Act. Plaintiffs request both injunctive relief and money damages.

Plaintiffs moved to certify a class pursuant to Rule 23 consisting of "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore are required to accept Visa Check and/or MasterMoney debit cards under the challenged tying arrangements, during the fullest period permitted by the applicable statutes of limitations." In support of their motion for class certification, plaintiffs submitted an expert report from Dennis Carlton, Ph.D in economics. ("Carlton"). Defendants opposed the motion for class certification and moved to strike Carlton's report. Defendants offered an expert report from Richard L. Schmalensee, Ph.D in economics ("Schmalensee"), in opposition to plaintiffs' motion for class certification and in support of their motion to strike. The district court issued a memorandum and order granting plaintiffs' motion for class certification and denying defendants' motion to strike Carlton's expert report. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y.2000). This Court granted defendants' petition to appeal, pursuant to Federal

Rule of Civil Procedure 23(f),[3] the district court's grant of plaintiffs' motion for class certification.[4] On appeal, defendants argue that the district court abused its discretion by finding that: (1) plaintiffs' expert report was sufficient to support class certification; (2) common issues predominate

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[3] Rule 23(f) provides "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order." Fed.R.Civ.P. 23(f). After the defendants' petition to appeal was granted, the appeal briefed and argued, but before we rendered this decision, this Court established a standard for determining whether to grant a Rule 23(f) petition: Petitioners must demonstrate either "(1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139-40 (2d Cir.2001). In this case, interlocutory jurisdiction was appropriate to resolve the uncertainty regarding the proper standard for evaluating expert opinions at the class certification stage, and to address the questions of predominance and manageability in light of individualized damage issues that emerge in tying cases.

[4] Defendants petitioned this Court under Rule 23(f) to review the district court's grant of plaintiffs' motion for class certification. This Court granted defendants permission to appeal the district court's grant of plaintiffs' motion for class certification, not the district court's denial of defendants' motion to strike. Under these circumstances, we have no jurisdiction to review the motion to strike. We note that a motion to strike expert evidence pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), involves a inquiry distinct from that for evaluating expert evidence in support of a motion for class certification, *see infra* Section III. A., although the parties' substantive arguments in both instances may be similar, as is true in this case. A *Daubert* motion is typically not made until later stages in litigation, such as in association with a motion for summary judgment, motion *in limine*, or at trial, and a district court should not postpone consideration of a motion for class certification for the sake of waiting until a *Daubert* examination is appropriate. *See* Fed.R.Civ.P. 23(c)(1) ("As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.").

over individual issues and that the case will be manageable as a class action, making certification under Rule 23(b)(3) appropriate; and (3) the class could also be certified under Rule 23(b)(2) even though plaintiffs request substantial monetary damages.

DISCUSSION

I. *Standard of Review*

This Court reviews a district court's grant or denial of a motion for class certification under a deferential standard. "Provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir.1999), *cert. denied sub nom Metro-North Commuter R.R. Co. v. Norris*, 529 U.S. 1107, 120 S.Ct. 1959, 146 L.Ed.2d 791 (2000) (internal quotation marks omitted).

II. *Standards for Class Certification*

To qualify for certification, plaintiffs must prove that the putative class action meets the four requirements set forth in Federal Rule of Civil Procedure 23(a):

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *see also Caridad*, 191 F.3d at 291. Additionally, a class action may be maintained only if it qualifies under at least one of the categories provided in Rule 23(b). Relevant to this action are Rules 23(b)(2) and (b)(3). Rule 23(b)(2) allows for the maintenance of a class action if "the party opposing the class has acted or refused to act on

grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Rule 23(b)(3) permits class certification "if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Factors relevant to the superiority of a class action under Rule 23(b)(3) include:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

Id. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (internal quotation marks omitted).

III. *Sufficiency of Plaintiffs' Expert Evidence*

A. The Expert Reports

The district court set forth in detail the contents of plaintiffs' and defendants' expert reports. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 74-76. The following is a brief summary of the contents of the expert reports.

Based on the allegations in the complaint, plaintiffs' expert, Carlton, theorized that absent the tying arrangement, a large number of retailers would have refused to accept Visa Check and MasterMoney and, as a result, defendants would have had to reduce their interchange fees in order to maintain merchant acceptance of those cards. Carlton concluded, therefore, that all class members have been injured by paying higher interchange fees for Visa Check and MasterMoney than they would have absent the tie. Based on this theory, Carlton stated that the following issues are subject to class-wide determination: (1) whether credit and debit cards have distinct characteristics; (2) whether Visa and MasterCard, individually and/or jointly, have market power in credit cards; and (3) whether Visa and MasterCard's tying policies injure all class members.[5] Carlton also proffered the following formula for calculating each class member's damages: In the absence of the tying arrangement, the interchange rates for

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[5] The substantive elements of plaintiffs' illegal per se tying claim are: (1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market. *See United States v. IBM Corp.*, 163 F.3d 737, 741 (2d Cir.1998). Plaintiffs could also prove their tying claims under a rule of reason theory, requiring plaintiffs to prove that the challenged action had an adverse effect on competition as a whole in the relevant market and, if the defendant shows a pro-competitive redeeming virtue of the action, that the same pro-competitive effect could be achieved though an alternative means that is less restrictive of competition. *See Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir.1997). The substantive elements of a monopoly claim are that: (1) defendants have engaged in predatory or anticompetitive conduct; (2) with the specific intent to monopolize; and (3) with a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). For any antitrust violation, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).

Visa Check and MasterMoney would have been comparable to that of on-line debit cards, and therefore, an individual class member's damages could be calculated by measuring the overcharge it had paid on all of the Visa Check and MasterMoney transactions it accepted.

Defendants' expert, Schmalensee, maintained that Carlton's model of how the debit card market would operate absent the alleged tie did not adequately take into account the following consequences that would have accompanied the cessation of the tie: (1) there would be less usage of Visa Check and MasterMoney if their interchange fees decreased because banks would issue fewer cards and defendants would spend less money advertising the cards; (2) credit card interchange fees would increase as debit card interchange fees decreased if credit cards were no longer tied in a "package" to debit cards; and (3) the existence and extent of each individual merchant's injuries are not amenable to class-wide determination because damages depend on the merchant's mix of credit and debit transactions.

In response to Schmalensee's assertion that the usage of off-line debit cards would decrease absent the tie to credit cards, Carlton pointed to two real-world instances in which a reduction in interchange fees for a particular payment card led to an increase in its usage, rather than a decrease, as Schmalensee's model would predict: (1) usage of Visa's on-line POS debit card increased after Visa dramatically lowered its interchange fees in 1997; and (2) usage of Visa's off-line POS debit card significantly increased after Visa cut its interchange fees for that card in 1992. Carlton also presented the following empirical evidence contradicting Schmalensee's theory that credit and debit cards are tied in a "package" where the interchange fees for credit cards would increase as that of off-line POS debit cards decreased: (1) credit card interchange fees are not higher in Canada, despite the fact that Canadian banks do not issue off-line POS debit cards and

thus do not have a "package" of debit and credit cards; and (2) in the United States between 1991 and 1998, interchange fees for off-line debit transactions greatly increased while credit card interchange fees generally stayed the same or increased slightly, as opposed to decreasing as Schmalensee's model would predict.

B. *Analysis*

Defendants contend that the district court erroneously relied on Carlton's report in granting plaintiffs' class certification motion because, according to defendants, the district court improperly limited its scrutiny of the report and Carlton's expert opinion "failed to provide a credible basis for class certification." Although a trial court must conduct a "rigorous analysis" to ensure that the prerequisites of Rule 23 have been satisfied before certifying a class, "a motion for class certification is not an occasion for examination of the merits of the case." *Caridad*, 191 F.3d at 291 (internal quotation marks omitted). A district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law. *See Cruz v. Coach Stores, Inc.*, No. 96 Civ. 8099, 1998 WL 812045, at *4 n. 3 (S.D.N.Y. Nov.18, 1998) (disregarding expert report submitted in support of motion for class certification because the report was "fatally flawed"), *aff'd in part, vacated in part on other grounds*, 202 F.3d 560, 573 (2d Cir.2000) ("[Plaintiff] has not shown that the court abused its discretion in finding the report methodologically flawed."); *accord In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y.1998) (granting class certification upon finding that "plaintiffs' econometric methodologies have a reasonable probability of establishing" plaintiffs' claims by common proof); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 (S.D.Fla.1996) (granting class certification upon finding that "Plaintiffs have demonstrated at least a 'colorable method' of proving [common injury] at

trial"); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 687 (D.Minn.1995) (stating that "in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all"). However, a district court may not weigh conflicting expert evidence or engage in "statistical dueling" of experts. *Caridad*, 191 F.3d at 292-93. The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive. *Id.* at 292-93.

To the extent that defendants' contention is that the court did not sufficiently examine whether Carlton's methodology was fatally flawed, and thus inadmissible even for class certification purposes, we reject this argument as meritless. The district court, in an almost fifty page opinion, thoroughly considered each of defendants' criticisms of Carlton's theory and Carlton's response to each of those criticisms and concluded in each case that Carlton's response sufficiently addressed the criticism. The district court correctly noted that its function at the class certification stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not fatally flawed, that the requirements of Rule 23 were met. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 76, 79. As for defendants' claim that plaintiffs' expert evidence failed to provide a reliable basis for class certification, the district court's finding that Carlton's methodology was not fatally flawed, and therefore, was sufficiently reliable for class certification purposes, does not constitute an abuse of its discretion. *Cf. Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455-56 (3d Cir.1977) (vacating and remanding the district

court's denial of plaintiffs' motion for class certification where plaintiffs could use an overcharge theory to prove their antitrust tying claims).

IV. *Rule 23(b)(3) Certification*

After finding that plaintiffs had shown that they met the requirements of Rule 23(a), the district court determined that the putative class is maintainable under Rule 23(b)(3) because plaintiffs had "establish[ed] that the common questions of law and fact identified predominate over any individual questions and that a class action is superior to any other means of adjudication" because "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 88. Defendants argue that the district court erred by certifying the class pursuant to Rule 23(b)(3) because individual questions predominate over the common issues and because the case will be unmanageable as a class action.[6]

A. *Predominance*

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that "the issues in the class

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[6] We do not separately discuss the requirements of Rule 23(a). On appeal, defendants' arguments primarily focus on whether the class is maintainable under either Rule 23(b)(2) or (b)(3). To the extent that defendants contend that plaintiffs failed to establish commonality and typicality as required by Rule 23(a) because individualized questions will arise regarding each plaintiff, we, like the district court, address these arguments in the context of the predominance requirement of Rule 23(b)(3). *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 81-88.

action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir.2000) (internal quotation marks omitted).

1. *Violation of Antitrust Law*

The district court examined whether plaintiffs could establish each of the three required elements of an antitrust claim—(1) a violation of antitrust law; (2) injury and causation; and (3) damages—using common evidence. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 81-88. Concerning proof of the substantive elements of an antitrust violation, the district court determined that plaintiffs could use common proof to establish the existence of a tying arrangement and to show defendants' market power. *Id.* at 87. Additionally, the court found that the question of coercion was also amenable to proof on a class-wide basis because the contractual provision to which all class members were subject—the "honor all cards" rule—would establish the requisite coercion. *Id.* at 88. Defendants do not seriously dispute on appeal that common proof could be used to prove the substantive elements of the antitrust violations, and the district court's findings on this issue do not constitute an abuse of its discretion.

2. *Injury-in-fact*

The district court also determined that plaintiffs' overcharge theory would permit them to establish injury-in-fact on a class-wide basis. *Id.* at 81-87. The court noted that although defendants argued that the overcharge theory was too speculative, defendants conceded in their briefs that the theory "is not unknown" and they did not "contend that no plaintiff could ever recover" under such a theory. *Id.* at 83. Defendants also claimed that injury-in-fact could not be established using common proof because the district court would be required to examine a number of issues on an

individual basis, including whether a merchant would have continued to accept off-line debit cards at their current prices even absent the tie, whether the merchant had the ability to process on-line debit transactions, and what forms of payment would replace the transactions formerly processed as off-line debit transactions. *Id.* at 82. The district court rejected this argument, finding that "Carlton's scenario is a complete answer to the defendants' attack on the theory of the complaint; it posits class-wide injury resulting from every single class member's overpaying for off-line debit cards as a direct result of the tie" and that "Carlton's theory does not require analysis of any of the individualized questions" suggested by defendants. *Id.* at 82-83.

The district court further found that plaintiffs had responded persuasively to defendants' other argument regarding injury-in-fact-that credit card interchange fees would increase if off-line debit card interchange fees decreased without the tie. *Id.* at 84. The court explained that plaintiffs had presented empirical evidence showing that credit card interchange fees do not necessarily increase when debit card interchange fees decrease; had informed the court that as part of their attempt-to-monopolize claim, they would demonstrate that the defendants had attempted to monopolize the debit card market in part to keep credit card interchange fees high; and had impeached Schmalensee on this issue by pointing to his deposition testimony that, although he thought it was likely credit card interchange fees would increase absent the tie, he had not "pushed it far enough to have an opinion." *Id.* at 84. Thus, the district court concluded that plaintiffs had met their burden of showing that injury-in-fact was amenable to common proof and that class treatment was therefore appropriate. *Id.*

3. *Causation*

The district court also considered and rejected defendants' arguments that causation could not be proven on a class-wide

basis. The court found that defendants' contention that, absent the tie, they would have selectively reduced fees as necessary to retain individual merchants' business was too speculative because defendants had not previously engaged in such merchant-specific pricing. *Id.* at 85. The court also observed that although defendants do have broad pricing categories for different classes of merchants, Carlton's damage formula could "easily be adjusted to account for that fact." *Id.* Further, the court found that defendants' claim that the usage of Visa Check and MasterMoney would decrease absent the tie was contradicted by empirical evidence and was not relevant to Carlton's overcharge theory. *Id.*

The court further found that defendants' contention that a merchant's ability to "steer" makes it impossible for plaintiffs to prove causation on a class-wide basis was without merit. Defendants argued that if a merchant did not want to accept off-line debit cards because of the allegedly inflated fees it would have to pay, the merchant could "steer" its customers to other forms of payment by, for example, converting the transaction to on-line debit by asking for a PIN or for another form of payment. *Id.* at 85-86. The court found, however, that if a customer refused to be steered, the merchant would have to allow the customer to complete the off-line debit transaction under defendants' "honor all cards" rule. The court stated that "[t]he presence of injury and causation is binary; it is either there or it is not. According to Carlton's theory, injury and causation is present for every putative class member." *Id.* at 86. The court observed, however, that if defendants "repackaged" their steering argument "as one addressing mitigation of damages," rather than causation, it "may . . . have force." *Id.* Therefore, the court concluded that causation also could be proven on a class-wide basis.

Defendants' arguments on appeal regarding the district court's finding that the existence of injury and causation can be established by class-wide proof appear merely to rehash

their many criticisms of Carlton's theory. Because we find that the district court's resolution of these issues did not constitute an abuse of its discretion, *see supra* Section III.B., we affirm the district court's determination that the existence of injury and causation can be proven on a class-wide basis.

4. *Damages*

The heart of defendants' predominance argument is that the common issues in this action do not predominate over the individual damages questions, primarily the defense of mitigation of damages by steering.[7] Although a court must examine the relevant facts and both the claims and defenses in determining whether a putative class meets the requirements of Rule 23(b)(3), the fact that a defense "may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir.2000). Rather, "[a]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of [a defense] will not automatically foreclose class certification under Rule 23(b)(3)." *Id.; accord Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir.1975) (stating that the existence of a

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[7] Plaintiffs contend that defendants waived this argument by raising below the issue of steering only in the context of plaintiffs' ability to prove injury-in-fact on a common basis and not as a mitigation defense that would preclude a finding of predominance and make the class unmanageable. *See Kraebel v. New York City Dep't of Hous. Pres. and Dev.*, 959 F.2d 395, 401 (2d Cir.1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it. . . ."). The district court correctly interpreted defendants' briefs as arguing that steering negated plaintiffs' ability to prove causation, not damages, by class-wide proof, although the court did observe that the steering argument could possibly be "repackaged as one addressing mitigation of damages." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 85-86. However, because defendants' contention that they raised below the steering argument in relation to damages finds support in their expert's affidavits, we address this argument on appeal.

defense "does not compel a finding that individual issues predominate over common ones" when there is a "sufficient nucleus of common questions"). Therefore, the question for purposes of determining predominance is not whether a defense exists, but whether the common issues will predominate over the individual questions raised by that defense.

Defendants' mitigation defense goes only to the calculation of damages. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 86. The district court found that Carlton's common formula for damages—that absent the tie, the interchange fees for off-line debit cards would have decreased, the interchange fees for credit cards would not have increased, and that an individual merchant's damages could be calculated by comparing those fees with the interchange fees actually paid—was not fatally flawed. *Id.* at 74, 84-85. We have already stated that the district court's determination did not constitute an abuse of its discretion. *See supra* Section III.B.; *cf.-Bogosian*, 561 F.2d at 455 (stating that in proving injury and damages for an illegal tie, "plaintiff[s] may recover the amount of the illegal overcharge" and "could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that [each plaintiff] made some purchases at the higher price"). Assuming *arguendo* that the mitigation defense is in-fact viable,[8] the majority of the issues relating to this defense are common to the class, including, *inter alia,* whether defendants' "honor all cards" rule allows steering and whether steering is impeded due to the physical similarities between Visa Check and Master Money and defendants' credit cards. The only individualized question regarding this mitigation defense, if viable, is the extent to which a particular merchant could have steered.

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[8] Plaintiffs dispute defendants' claim that the "honor all cards" rule permits individual merchants to steer customers to other forms of payment. Plaintiffs' motion for summary judgment to dismiss this mitigation defense is pending before the district court.

Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues. *See, e.g., Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir.2001) (affirming district court's determination that common issues predominated because "[a]lthough calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue"); *Bogosian*, 561 F.2d at 456 (stating that although calculation of damages in an antitrust action would involve some individualized issues, "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796, 798 (10th Cir.1970) (affirming district court's determination that common issues predominated in an antitrust suit "where the question of basic liability can be established readily by common issues" and stating that "[t]he fact that there may have to be individual examinations on the issue of damages has never been held, however, a bar to class actions"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment."); 8 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulations* § 166.03[3][a][i] (2d ed. 1997) ("In antitrust cases, courts are more likely to consider the critical issue to be whether common liability issues predominate and to disregard individual damages . . . questions."); 4 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 18.27, at 18-89 (3d ed.1992) (stating that for antitrust class actions, "[a] particularly significant aspect of the Rule 23(b)(3) approach is the recognition that individual damages questions do not preclude a Rule 23(b)(3) class action when the issue of liability is common to the class"); *cf.* II Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 331d, at 282

(2d ed. 2000) ("Although the evidence establishing damages usually varies from class member to class member, this fact alone does not defeat certification."); *see generally* Fed.R.Civ.P. 23(b)(3) advisory committee's notes to 1966 Amendments (explaining that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action [under Rule 23(b)(3)], and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class"). District courts have correctly recognized that any other rule would eliminate antitrust class actions:

> [I]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by the various courts confronted with the same argument. The predominance requirement calls only for predominance, not exclusivity, of common questions.

In re Alcoholic Beverages Litig., 95 F.R.D. 321, 327-28 (E.D.N.Y.1982) (internal quotation marks omitted); *see also In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1044 (N.D.Miss.1993) (same); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D.Pa.1979), *aff'd*, 685 F.2d 810 (3d Cir.1982) (same).

Under Carlton's theory of the case, which the district court found to be sufficiently reliable for class certification purposes, plaintiffs can prove on a class-wide basis: (1) the substantive elements of the antitrust violations; (2) injury-in-fact and causation; (3) viability of the mitigation defense; and (4) general application of the overcharge formula for damages. In contrast, the only issues that might require some individualized inquiry under Carlton's theory are: (1) the extent to which a particular merchant could have steered

customers away from off-line debit card transactions, assuming the mitigation defense is viable; and (2) the calculation of damages using the overcharge formula and, if necessary, mitigation. Under these circumstances, we cannot say that the district court's conclusion that the common issues of law and fact predominated over the individualized issues constitutes an abuse of its discretion.

B. *Manageability*

Defendants also argue that the calculation of individualized damages makes this case unmanageable as a class action. We disagree. There are some situations where courts have determined that a case is not manageable as a class action because of the necessity for individualized damages determinations. *See, e.g.*, II Areeda et al., *supra*, ¶ 331, at 283 n. 22; 8 von Kalinowski et al., *supra*, § 166.03[3] (collecting cases). Nevertheless, failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and "'should be the exception rather than the rule.'" *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D.La.1980) (quoting Manual for Complex Litigation, § 1.43 n. 72 (1977)); *see also In re Workers' Compensation*, 130 F.R.D. 99, 110 (D.Minn.1990) (stating that "dismissal for management reasons is never favored"); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 78 F.R.D. 622, 628 (W.D.Wa.1978) (stating that "dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule") (internal quotation marks omitted); 8 von Kalinowski et al., *supra,* § 166.03[3][b][iv] ("Generally, though, class action status will be denied on the ground of unmanageability only when it is found that efficient management is *nearly impossible*; some courts have stated that there is a presumption against refusing to certify a class on manageability grounds.") (emphasis in original); *see generally Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir.1972) (stating that "for a court to

refuse to\certify a class . . . because of vaguely-perceived management problems . . . discount[s] too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise").

There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries;[9] (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class. *See, e.g.*, Fed.R.Civ.P. 23(c)(4) (stating that "[w]hen appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class"); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 12 n. 11, 14 (2d Cir.1975) (discussing use of a separate liability and damages trial in an antitrust case and, if appropriate, use of subclasses to facilitate damages determination); *Green v. Wolf Corp.*, 406 F.2d 291, 300-01 (2d Cir.1968) (stating that "[t]he district court may use the procedures suggested by Rule 23 to cope with the [distinctions between plaintiffs], if, indeed, they exist" and noting that if the district court encounters individual damages issues "[t]he effective administration of 23(b)(3) [may] . . . require the use of the sensible device of split trials") (internal quotation marks omitted); 1 Newberg & Conte, *supra*, § 4.26, at 4-91 to 4-97 (collecting

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[9] A district court's ability to bifurcate a trial is limited by the Seventh Amendment. *See Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir.1999) ("At bottom, issues may be divided and tried separately, but a given issue may not be tried by different, successive juries."). Despite defendants' briefing on this issue, it would be premature for us to determine whether and under what circumstances bifurcation might be permissible in this case.

cases applying each of these management tools); 4 Newberg & Conte, *supra*, § 18.27, at 18-98 (stating that courts "usually provide for a separate proceeding" in antitrust suits where individualized damages issues arise); 8 von Kalinowski et al., *supra*, § 166.03[3][a][i] (discussing adjudication of individualized questions in separate actions or in separate damage proceedings, allowing a class action to proceed for the purposes of litigating particular issues, or dividing the class into subclasses, and collecting cases applying those tools); *id.* at § 166.03[3][b][iv] (stating that manageability problems may be obviated by dividing the class into subclasses or confining certification to certain issues). We emphasize that "the issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and peculiarly within its discretion." *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir.1977) (internal quotation marks omitted).

The district court recognized that although it appeared at this preliminary stage that damages could be determined with the aid of a class-wide formula, it had the flexibility to address any individualized damages issues, including the steering mitigation defense, that might arise. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 86 n. 19, 89. In this regard, the court specifically recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary. *Id.* at 89. Because the district court adequately considered how it would address any individualized issues that might arise in the case, the district court's conclusion that this action will be manageable as a class action does not constitute an abuse of its discretion.

Defendants erroneously suggest that our decision in *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir.1983), compels a finding that this case is unmanageable. In *Abrams*, we held that the district court did not abuse its discretion by declining

to certify an antitrust suit on manageability grounds. The district court in *Abrams* determined that individualized issues of fact would "greatly predominate" over common issues, causing "severe difficulties in the management of the class action" because "[b]y alleging a conspiracy with some dealers, coercion of others, and bribery of still others, the plaintiffs had raised issues relating to [defendant's] individual relationships with each of its thousands of dealers." *Abrams*, 719 F.2d at 29 (internal quotation marks and alterations omitted). The district court observed that certification might have been appropriate if plaintiffs had instead alleged "some pattern on [defendant's] part which was reasonably consistent, affecting all or most of the dealers referred to in the complaint." *Id.* (internal quotation marks omitted). We affirmed the district court's finding that the case was unmanageable, particularly with regard to damages, because plaintiffs' damages calculations "would be complicated by the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years" and would necessitate "individual trials on damages" for "thousands or millions" of class members. *Id.* at 31 (internal quotation marks omitted).

In stark contrast, the action before us involves only two products (credit cards and off-line POS debit cards) with set interchange fees and class members who can be identified by defendants' own records. In this action, unlike in *Abrams*, there are no individualized issues relating to each plaintiffs' relationship with Visa and MasterCard because defendants' "honor all cards" rule contractually applied to each of the plaintiffs in the putative class. Additionally, plaintiffs here, unlike in *Abrams*, have alleged a common practice affecting each member of the class and have proffered a damages formula to assist with the calculation of damages. Thus, we find defendants' reliance on *Abrams* is misplaced.

We conclude that the district court did not abuse its discretion in finding that the action will be manageable as a class action.

C. *Adequacy of Representation*

The dissent discusses an issue not raised by the parties regarding adequacy of representation. Rule 23(a)(4) provides that, in order to certify a class, its proponents must show that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This rule requires courts to ask whether "plaintiff's interests are antagonistic to the interest of other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir.2000); *see also Amchem*, 521 U.S. at 625-26, 117 S.Ct. 2231 (stating that class members must "possess the same interest and suffer the same injury" to meet the Rule 23(a)(4) requirement) (internal quotation marks omitted). The dissent argues that the district court abused its discretion by failing to determine which of the two available techniques for measuring damages should be used before it decided to certify the class, because the choice of the "correct" measure of damages in this action would lead to conflicts among class members and inadequacy of representation. We disagree.

As the dissent points out, and the district court recognized, there are two basic methods that courts use to measure damages in tying cases. One method is the "tied product" approach, as referred to by the district court. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 85 n. 15. Under this measure, the damages awarded reflect the difference between the price actually paid for the tied product and the price for which the item could have been purchased on the open market. *See* 8 von Kalinowski et al., *supra,* § 171.03[1], at 171-28 (describing the tied product approach). The second approach is the so-called "package" measure, which would award damages only to the extent that the plaintiff overpaid for the *combination* of the tied and tying

products. *See* X Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1769c, at 430-31 (1996) (asserting the package approach as the proper standard).

The question of whether to apply the "tied product" or "package" approach is a complex issue that has long divided the circuits. *Compare Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1054 (5th Cir.1982) (tied product approach), *and Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir.1981) (tied product approach), *and Northern v. McGraw Edison Co.*, 542 F.2d 1336, 1347 (8th Cir.1976) (tied product approach), *with Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir.1985) (package approach), *and Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.1982) (package approach), *and Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir.1971) (package approach). This Court has not taken a position on the issue.

The district court discussed these competing lines of cases when it considered whether the alleged injury-in-fact was amenable to class-wide treatment. *See In re Visa Check/ MasterMoney Antitrust Litig.*, 192 F.R.D. at 83-84. Defendants advocated the "package" measure and contended that, under this approach, injury-in-fact would no longer be susceptible to class-wide proof. *Id.* Plaintiffs countered that, under the "tied product" approach, the process of proving damages would be uniform among the class members. *Id.* The district court did not choose between the two approaches because it found that plaintiffs' theory of the case, supported by their expert, rendered such a decision unnecessary. *Id.* The plaintiffs' expert opinion asserted, as discussed above, that the price of the tying product (the credit cards) would not have risen absent the tie. *Id.* The district court found this evidence credible and determined that plaintiffs had made a showing, sufficient to support class certification, that the price

of the tied package would decline without the tie. *Id.* As a result, the court concluded that it "need not choose between the competing line of cases [because] plaintiffs have proffered a sufficient theory of class-wide injury under either the 'package' or the 'tied product' measure of injury." *Id.* at 85 n. 15.

The dissent contends that choosing a damage measure was essential to the disposition of this case and that failure to do so was an abuse of discretion. In the dissent's view, the correct measure of damages is the "package" approach. *See post*, at 155. The dissent argues that if the district court had properly decided this issue and had correctly chosen the "package" approach, certification would have been defeated because the interests of the class members would have conflicted, causing inadequacy of representation. *Id.* Because this is a variable proportion tying case, according to the dissent, class members who have transacted predominantly with credit cards would have interests differing from those who have processed mostly debit cards.

There is no need on this interlocutory appeal from class certification for this Court to decide which of the two approaches to measuring damages in tying cases is appropriate. By engaging in the following analysis, this Court does not endorse the "package" measure of damages. We consider the question to be an open one in this Circuit. We proceed on the assumption that the "package" measure would apply only to test the dissent's contention that, if this approach were adopted, intractable conflicts would emerge within the class. This contention forms the basis of the dissent's conclusion that the district court abused its discretion by not choosing a measure of damage before deciding to certify the class. Because we conclude that the possible tensions identified by the dissent are not fatal to certification, we find that the district court did not abuse its discretion by declining to decide the issue at the certification stage.

As an initial matter, we note that the dissent's concerns turn largely on the sufficiency of the plaintiffs' expert opinion. We have already affirmed the district court's finding regarding the sufficiency of that opinion, concluding that it was not fatally flawed. This expert opinion, adequate to support our finding of predominance under Rule 23(b)(3), is likewise sufficient to uphold a finding of adequacy of representation under Rule 23(a)(4).

The dissent maintains, however, that the very choice to adopt this expert theory is symptomatic of intractable conflicts within the class, causing certification to run afoul of Rule 23(a)(4). *See post,* at 158. The dissent divides the class into three groups of merchants, based on the merchants' proportion of debit card sales to credit card sales. The interests of these three groups, according to the dissent, would be fundamentally at odds if the "package" measure of damages were applied at trial.[10] Including these three groups in one class, the dissent argues, compromises the interests of the merchants whose debit card sales predominate over their credit card sales. For these merchants, the task of proving that credit card prices would not be higher without the tie "is unnecessary and impedes recovery under other theories that offer better prospects of recovery." *Id.*

The dissent overstates the potential conflict. The three types of merchants discussed by the dissent have much in common—not only as to liability, but as to damages as well. All class members, regardless of their debt/credit proportion, wish to prove that the debit card fees would be significantly lower without the tie. Every member also has an interest in establishing the hypothetical, "untied" price as low as possible in order to maximize recovery of damages. As for establishing the hypothetical, "untied" price of credit cards,

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[10] The dissent concedes that, under the "tied product" approach, "the interests of the class members would be aligned." *Post,* at 155.

the tension is not nearly as pronounced as the dissent contends. It may be less vital for merchants with predominantly debit card sales to prove that credit cards would be no more expensive without the tie. It is, however, still in the interest of these merchants to show that credit card fees would not have increased, because any finding to the contrary would likely reduce, though not decimate, their damage awards if the "package" measure were applied. It would seem to maximize the potential recovery for all three groups to argue, as they do here, that credit card prices would not increase without the tie. Other theories may or may not be simpler to prove. Even if they are, the debit-heavy merchants would not necessarily choose to concede that credit card prices would increase, and see their potential damage awards diminished.

Even if a level of conflict may exist among the three groups, that potential for conflict need not defeat certification. While Rule 23(a)(4) is designed to ferret out potential conflicts between representatives and other class members, *see Amchem*, 521 U.S. at 625-26, 117 S.Ct. 2231, "not every potential disagreement between a representative and the class members will stand in the way of a class suit." 1 Newberg & Conte, *supra*, § 3.26, at 3-143. "The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental," *id.* § 3.26, at 3-143 to -144, and "speculative conflict should be disregarded at the class certification stage." *Id.* § 3.25, at 3-136; *see also* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.25[4][b][ii], at 23-119 (3d ed.1998) (stating that to find inadequacy of representation "most courts hold that the conflict must be more than merely speculative or hypothetical"). Courts have applied these general principles with regularity in the area of antitrust. *See* 4 Newberg & Conte, *supra*, § 18.14, at 18-40 to -43 n. 65 (collecting antitrust class action cases in which differences among class members were not held to result in inadequacy of representation); *cf. Eisen v. Carlisle & Jacquelin*, 391 F.2d

555, 562 (2d Cir.1968), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (explaining that, in antitrust litigation, the fact that class members may "have varying theories as to what constitutes the 'excessive price'" will not generally defeat certification where all members "will be helped if the rates are found to be excessive").

In the event that the district court does find conflicts arising of the type identified by the dissent, there are a variety of devices available to resolve the problem. We discussed a battery of options in Part IV.B. of this opinion. Of particular relevance here are the possibilities of bifurcating liability and damage trials, decertifying the class after the liability trial, and creating subclasses. The availability of this range of options sufficiently addresses the dissent's concerns regarding adequacy of representation.

Having determined that the district court did not abuse its discretion in finding that common issues of law and fact predominate, that the action will be manageable as a class action, and that choosing a measure of damages was not required before certification, we affirm the district court's certification of the class under Rule 23(b)(3).

D. *Effect of Certification*

Given these conclusions regarding the soundness of the class under Rule 23, the dissent's comments about the possibility that certification will coerce defendants into settlement are largely inapposite. The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification. The dissent notes that, in our recent decision in *Sumitomo*, we listed as a basis for granting a Rule 23(f) appeal the fact that "the certification order will effectively terminate the litigation." 262 F.3d at 139-40; *post*, at 147. We need not decide whether this is such a "death

knell" certification because the other basis for granting a Rule 23(f) appeal—the existence of legal questions requiring resolution—is present. *See ante,* at 131-132 n. 3. Even assuming *arguendo* that we found this to be a "death knell" case, under *Sumitomo* that finding would bear only on our decision to grant the interlocutory appeal. Now that we have granted the appeal and found the district court's certification decision to be thorough, accurate, and not an abuse of discretion, the dissent's argument about coercion loses its force.

Meanwhile, the dissent underestimates the powerful policy considerations that favor certification, and ignores the exhaustive analysis performed by the district court, carefully applying the Rule 23 requirements for class certification. While both the district court and this Court have acknowledged that difficulties in managing this large class action may arise, these problems pale in comparison to the burden on the courts that would result from trying the cases individually. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 88 (observing that "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct").

It is not as though the class members were haphazardly thrown together, nor "herded" or "agglomerated" as the dissent contends. *Post,* at 157, 153. They were, after all, allegedly aggrieved by a single policy of the defendants. Given the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited.

V. *Rule 23(b)(2) Certification*

Certification under Rule 23(b)(2) is permissible when defendants have acted on grounds generally applicable to the class, making final injunctive or declaratory relief appropriate. Fed.R.Civ.P. 23(b)(2). Certification under Rule

23(b)(2) is not appropriate, however, in "cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed.R.Civ.P. 23(b)(2) advisory committee's notes to 1966 Amendments.

The district court found that the putative class is certifiable under Rule 23(b)(2), in addition to Rule 23(b)(3), because "[t]he 'honor all cards' rule is 'generally applicable' to all members of the class, and the request for an injunction ending it is central to the plaintiffs' suit."[11] *In re Visa Check/ MasterMoney Antitrust Litig.*, 192 F.R.D. at 88. The court estimated that the injunctive relief requested would have an economic value of $63 billion, which is significant even when compared to the preliminary monetary damage estimate of $8 billion. *Id.* at 88-89. Defendants contend that the district court abused its discretion by finding that this action is maintainable under Rule 23(b)(2). Specifically, relying on a recent line of cases from other circuits, defendants argue that the money damages in this case predominate because they are not merely incidental to the injunctive relief, making class certification under Rule 23(b)(2) inappropriate. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir.1998) (*reh'g denied by* 1998 U.S.App. LEXIS 24651) ("[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief."); *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir.2001) (adopting reasoning of *Allison* Court); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir.1999) (same).

Neither the Supreme Court nor this Circuit has delineated the precise circumstances under which a putative class requesting both injunctive and monetary relief can be certified under Rule 23(b)(2). *See Jefferson*, 195 F.3d at 897 ("It is an

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[11] The court noted that because it found certification appropriate under both Rule 23(b)(2) and (3), its inclination was to provide general notice to the class but to provide opt-out only as to the damages claims. It stated, however, that it would solicit the parties' views on the question. *Id.* at 89.

open question . . . in the Supreme Court whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue.") (citing *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33, (1994)) (emphasis in original); *cf.* 1 Newberg & Conte, *supra,* § 4.14, at 4-49 ("Least settled is the common situation when both injunctive relief and damages are sought for the class, and both forms of relief are important and equally sought. Most courts use a predominance test to determine which form of relief is primary, and in light thereof, whether Rule 23(b)(2) or (b)(3) applies."). We need not delve into this thorny question today, however, because we have already concluded that the district court appropriately certified the class under Rule 23(b)(3). *See* 8 von Kalinowski et al., *supra*, § 166.03 ("Once a court has found that a class action is maintainable under any single category [of Rule 23(b)], there is no necessity of showing that it may also be brought under any other."); *see also Jefferson*, 195 F.3d at 898 ("Rule 23(b) begins by saying that an action 'may' be maintained as a class action when the prerequisites of subdivision (a) and a part of subdivision (b) have been satisfied; it does not say that the class *must* be certified under the *first* matching section.") (emphasis in original).

In any event, the primary concern about certifying a class with significant damages under Rule 23(b)(2) is the absence of mandatory notice and opt-out rights. *See Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-82 (7th Cir.2000); *Allison*, 151 F.3d at 414-15. Because these rights are guaranteed under Rule 23(b)(3), pursuant to which this action will now proceed, our inquiry need progress no further. *See Lemon*, 216 F.3d at 581-82 (discussing methods for avoiding procedural problems in cases with both injunctive and monetary relief); *cf. Chateau De Ville Prods., Inc. v. Tams Witmark Music Library, Inc.*, 586 F.2d 962, 966 n. 14 (2d Cir.1978) (noting that when a district court certifies a

class under both Rule 23(b)(2) and (b)(3), "major problems can arise . . . where different procedural consequences attach depending upon the subsection used"). Therefore, we need not consider whether the district court erred by certifying the class under Rule 23(b)(2) in addition to Rule 23(b)(3).

CONCLUSION

For these reasons, we affirm the district court's grant of plaintiffs' motion for class certification pursuant to Rule 23(b)(3).

JACOBS, Circuit Judge, dissenting:

I respectfully dissent.

In *In re Sumitomo Copper Litigation*, we recently held that "petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decisions is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." 262 F.3d at 139, (2d Cir.2001) This approach accords with the advisory committee's note to the Rule: "Permission to appeal . . . is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." Fed.R.Civ.P. 23 advisory committee's note.

Appellants here have made a more than sufficient showing under *Sumitomo* (A) that the certification order tends to terminate the litigation by a coercive settlement and (B) that two crucial rulings (embedded in the district court's otherwise thorough opinion) are questionable, to say the least.

(A) Rule 23(f) was adopted in part to alleviate the danger that an erroneous "order granting certification" may force a defendant "to settle rather than incur the costs of defending a class action and run the risk of ruinous liability." Fed.R.Civ.P. 23 advisory committee's note. One sound basis for granting jurisdiction under Rule 23(f) is thus the circumstance that the class certification "places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability." *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3rd Cir.2001). No doubt, true "death knell" cases are few; and a reviewing court "must be wary lest the mind hear a bell that is not tolling." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir.1999). But in this case—in which the aggregated and trebled claims of the four

million class members are alleged to top $100 billion—a carillon is in full peal. Even a defendant who is innocent and holy may rationally choose to pay a few hundred million dollars in settlement of a class action rather than "run the risk of ruinous liability." As the district court observed (without the slightest overstatement), the "enormous financial risks" faced by the defendants "are obviously increased drastically by certification of the class." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 89. The certification order in this case may therefore coerce settlement.

(B) The district court's decision is rendered "questionable" by two errors of law that render grant of the certification an abuse of discretion.

First, the district court inadequately considered whether the class action can be manageably tried and has certified the four million member class without identifying a "'practical means'" for calculating the *extent* of each merchant's damages. *See Abrams v. Interco*, 719 F.2d 23, 31 (2d Cir.1983) (Friendly, *J.*) (quoting II Areeda & Turner, *Antitrust Law* ¶ 332c, at 157 (1978)). The majority opinion draws comfort from the conditional nature of the certification and the district court's retained power to modify it. But this is cold comfort for the defendants: the brutally coercive effect of the certification cannot be stayed.

Second, the district court ruled on certification without deciding a threshold question of law that determines whether the class members' interests will be aligned and therefore whether litigation by representative is appropriate. Courts are split on whether a tying plaintiff's injury must be measured (as I believe) by how much the tie increased the combined cost of buying both the tying and the tied products. If that is the correct measure, there can be no class here because the putative members used the tying and tied products in *different proportions*, and therefore have conflicting interests when it comes to how the fact and extent of any injuries are to be proven.

Because of these two legal errors, and because the majority opinion is so deferential that this appeal is no check at all on the coercion that Rule 23(f) is designed to curb, I cannot join the majority opinion.

I.

Certification Prior to Identification of a "Practical Means" for Trying Four Million Claims

In ruling on certification, a court is required to consider "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. Pro. 23(b)(3)(D). And unless a court is "confronted with a request for a *settlement-only* class certification," the court must specifically "inquire whether the case, *if tried,* would present intractable management problems." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (emphasis added) (noting that the inquiry is unnecessary as to "settlement-only" classes, because "the proposal is that there be no trial" (citing Fed. R. Civ. Pro. 23(b)(3)(D))). For that reason, Judge Friendly instructed that if an antitrust "'class numbers in the thousands or millions,'" a court may not grant certification until "'it can devise a practical means'" for trying the action.[1] *Abrams*, 719 F.2d at 31 (quoting II Areeda & Turner, *supra* ¶ 332c, at 157).

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[1] Many district courts have ignored Judge Friendly's admonition in *Abrams*. But as the trial judge in this case recognized, those courts "state the rule that individual damages questions will not bar class certification *in conclusory fashion* without assessing whether individual questions would predominate if each damages action had to be tried separately." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 86 n. 19 (emphasis added); *cf. Szabo v. Bridgeport Machines*, 249 F.3d 672, 675 (7th Cir.2001) (granting Rule 23(f) review because "the district court's decision to certify the class implie[d] that important legal principles have evaded attention by appellate courts. At critical junctures the district judge cited only decisions by other district judges, most in cases later settled and thus not subject to appellate consideration.").

Any case of this size and numerosity is beset by potentially intractable problems of manageability. The crucial, unresolved difficulty in this litigation concerns individualized proof of damages, an issue that "can be critical in determining whether a class of antitrust claimants should be certified." *Manual for Complex Litigation* § 33.11, at 303 (3d ed.1995); *see Windham v. American Brands, Inc.*, 565 F.2d 59, 71 (4th Cir.1977) (en banc) (holding that "in determining the manageability of a proposed [antitrust] class action," the district court must "consider proof of damages"). Specifically, a defense has been interposed that if litigated would require findings as to the extent of the damages recoverable by *each* of the four million members of the putative class.[2]

The law is "settled that affirmative defenses should be considered in making class certification decisions." *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 295 (1st Cir.2000); *see also Majority Op.* at 138, 139 (a court must examine "*defenses* in determining whether a putative class meets the requirements of Rule 23(b)(3)") (emphasis added); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir.1996) ("Going beyond the pleadings is necessary, as a court must understand [inter alia] defenses . . . in order to make a meaningful determination of the certification issues."); *cf. Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 342 (4th Cir.1998) (certification is "erroneous" when affirmative defenses "may depend on facts peculiar to each plaintiff's case") (citation omitted). And there is good reason for considering the manageability of defenses in this

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[2] The right to assert the defense against each and every class member is guaranteed by the Rules Enabling Act. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (2d Cir.1973) (recognizing that under the Act, Rule 23 cannot "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

case: even if each merchant's claim took no more than a half a day to sort out, the damages phase of trial would last as long as the whole course of Western civilization from Ur.

The asserted defense—which the district judge acknowledged may "have force"—is that the merchants had a duty to mitigate their losses by encouraging at least some of their customers to use forms of payment other than off-line debit. *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. at 86. We have repeatedly held that mitigation is a viable theory in antitrust actions. *See Litton Systems v. AT & T*, 700 F.2d 785, 820 n. 47 (2d Cir.1983) (Sherman Act § 2); *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 399 (2d Cir.1980) (Sherman Act § 1); *see generally* Neil W. Hamilton & Virginia B. Cone, *Mitigation of Antitrust Damages*, 66 Or. L.Rev. 339 (1984). Enforcement of the mitigation duty may be even more critical in antitrust cases than in cases sounding in contract or tort because an antitrust plaintiff seeking treble damages can profit by avoiding mitigation of loss. *See* Hamilton & Cone, *supra* at 355 (noting "the perverse impact of trebling on a plaintiff's incentive to minimize damage").

Just as we assume for purposes of class certification that the illegality of the tie is litigable, we must assume that defendants will be entitled to try their mitigation defense. The rule against pre-certification decisions on the merits is non-partisan and serves neutrally to avoid the risk that a "court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The majority recites the principle that a court "must examine . . . *defenses* in determining whether a putative class meets the requirements of Rule 23(b)(3)," but finds no abuse of discretion because the district court "specifically recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an

action ultimately became necessary." *Majority Op.* at 138, 139 (emphasis added) (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 89 (citing Fed. R. Civ. Pro. 23(c)(1))).

This approach reflects a serious misinterpretation of Rule 23(c)(1), which permits courts to enter a "conditional" certification and then alter or amend the certification as the case proceeds. But as other circuits have repeatedly explained, individual questions "must be resolved *before* a class is certified, even if certification is conditional." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.1974) (emphasis added); *accord Windham v. American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir.1977) (en banc). Conditional certification therefore is emphatically not an expedient by which a court may "'avoid deciding whether, at that time, the requirements of the Rule have been substantially met.'" *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir.1996) (quoting *In re Hotel Tel. Charges*, 500 F.2d at 90); *accord In re American Med. Sys.*, 75 F.3d 1069, 1088 n. 21 (6th Cir.1996); *see Manual for Complex Litigation* § 30.11, at 215 ("Although Fed.R.Civ.P. 23(c)(1) permits entry of a 'conditional' class determination order and amendment before the decision on the merits, *that procedure should not be used to defer a final class ruling.*") (emphasis added). "'The purpose of conditional certification'" is, rather, "'to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal *problems not theretofore apparent.*'" *Castano*, 84 F.3d at 741 (emphasis added) (quoting *in re Hotel Tel. Charges*, 500 F.2d at 90).

The manageability problem in this case has been "apparent" from the outset and is apparent right now. The record developed so far reveals that Mastercard encouraged merchants to channel customers to the company's on-line debit alternative, which it explained was "more secure and

therefore less expensive." And as plaintiffs conceded in the district court, some merchants *did* adopt programs that so channeled an appreciable number of would-be off-line debit transactions, thus reducing the amount of damages that those class members could collect from this suit. *See* Plaintiffs' Reply Memorandum of Law in Support in of Plaintiffs' Motion for Class Certification at 36-37 & n. 40. The mitigation issues are whether it is reasonable to expect *other* class members to have adopted similar programs, and to what extent would such programs have achieved mitigation for such class members. The district judge's recognition that the defense may "have force" is well-founded.[3]

It makes no sense to provide individualized notice to millions of merchants before the court has devised a "practical means" for trying the issues presented. *See* Fed. R. Civ. Pro. 23(c)(2) (requiring "individual notice to all [Rule 23(b)(3) damages class] members who can be identified through reasonable effort"). Certification that is premature does no favor to the millions of absent class members because "[u]ndesirable consequences may follow" if the class "is later decertified or redefined." *Manual for Complex Litigation* § 30.11, at 215. Class members who are "eliminated from the litigation as a result of decertification or reduction in the size of a class may be confused at best or prejudiced at worst." *Id.* Even if relief is eventually obtained for a pared down class, "those who were initially in the larger class may attempt to reverse the decision that excluded them from the class; such a reversal may be particularly troublesome if the relief was obtained by settlement." *Id.*

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[3] I agree with the majority that the "honor all cards" rule precluded any merchant from mitigating his alleged losses down to zero, *Majority Op.* at 17, but the issue that challenges manageability is the effect of channeling on the *amount* of damages. *See in re Visa Check / Mastermoney Antitrust Litig.*, 192 F.R.D. at 86 ("The *fact* of injury is binary; it is either there or it is not. The *extent* of injury is another question.").

The majority opinion's view of conditional certification also seriously impairs our ability to conduct a meaningful interlocutory review under Rule 23(f). Conditional certification is not a hedge against present error. Our power of interlocutory review was conferred for a case such as this, where scores of billions of dollars are thought to be at stake and no procedure has been conceived for a fair merits adjudication. A purpose of our interlocutory look is to assure that defendants are not coerced into settlement by an improvident certification, conditional or otherwise. But if district courts can simply postpone consideration of difficult issues by making certification "conditional" (as all certifications tend to be anyway), it is unlikely that we would ever vacate such an order. At a minimum, the approach in the majority opinion will lead unnecessarily to multiple requests for appellate intervention in large-scale class actions: one after the conditional certification, and others as the district judge eventually confronts issues that were apparent before conditional certification was given.

Finally, unless there is a "practical means" of trying the case, certification leads to unfairness and injustice: if the district court later finds that a trial is unmanageable, the named plaintiffs and their counsel lose nothing, but in the meantime they have in hand the means to extract a favorable settlement of what may be weak claims. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (explaining that a "representative plaintiff" should not be allowed to "secure the benefits of a class action without first satisfying the requirements for it"). Once a certification "order is issued, the parties can be expected to rely on it and . . . engage in settlement discussions on the assumption that in the normal course of events it will not be altered except for good cause." *Manual for Complex Litigation* § 30.17, at 223. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small

probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir.1995) (Posner, *J.*) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)); *accord Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n. 21 (11th Cir.2000) (referring to "the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement"). Unfortunately, the majority's excessive deference facilitates such an injustice. *Cf. Szabo v. Bridgeport Machines*, 249 F.3d 672, 675 (7th Cir.2001) (holding that a "prime occasion for Rule 23(f)" appellate review is when class certification "puts a bet-your-company decision to [defendant's] managers and may induce a substantial settlement even if the [plaintiffs'] position is weak").

Finally, de-certification would not doom this litigation; this is not a case in which the named plaintiffs' claims are "far smaller than the costs of litigation." Fed.R.Civ.P. 23(f) advisory committee's note. For instance, if named plaintiff Wal Mart Stores processed even 10% of its sales with credit and off-line debit, and if it established an (average) one-half percent overcharge on those transactions, its claim would reach a quarter billion dollars (with trebling and before attorneys' fees) for 1999 alone.

II.

Conflicts Among Class Members in Proving the Fact and Extent of Injury

Certification of this class is untenable for another, entirely independent reason: under the correct measure of injury in a tying case, the class members face irreconcilable conflicts in proving the fact and extent of any injury caused by the tie. Rule 23(a) therefore prohibits litigation by representative because no representative can adequately protect the interests of the millions of absent class members. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 156-57 & n. 13, 102 S.Ct. 2364,

72 L.Ed.2d 740 (1982) (Rule 23(a) tests "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence").

There is little dispute that plaintiffs can use common proof to litigate the threshold question as to whether there is an illegal tie.[4] Consequently, the "principal" issue for consideration by the district court in weighing certification was whether the plaintiffs *also* could prove that the allegedly illegal tie caused the class "injury in fact" the "gravamen of a tie-in action." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 81 ("[E]ven an antitrust plaintiff who has successfully proven illegal conduct on the part of the defendant must also show that it was 'injured in fact' by the illegality."); *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.1982). The injury in fact element is satisfied by "proof of *some* damage flowing from the" defendant's conduct, *see Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); under the Rules Enabling Act, this requirement applies to class actions as well as to litigation by named parties only. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir.1978); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir.1977). Plaintiffs therefore concede that their class of four million merchants cannot be certified unless plaintiffs rely on a theory that posits at least some injury to *every* class member. However, the district court avoided or has delayed deciding how injury in fact would be measured. In this litigation, that is a vexed question.

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[4] I also assume *arguendo* that plaintiffs can use common proof to show that the tie had an anticompetitive effect on the relevant market, a showing required of all private antitrust enforcers regardless of whether they pursue a "per se" or rule of reason claim. *See Balaklaw v. Lovell*, 14 F.3d 793, 801 & n. 17 (2d Cir.1994).

In many tying cases, measuring the impact of the tie is fairly mechanical because the buyers have used the two products in *fixed proportions. See, e.g., United States v. Microsoft Corp.*, 147 F.3d 935 (D.C.Cir.1998) (one computer operating system; one internet web browser); *Town Sound and Custom Tops v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir.1992) (en banc) (one car; one automobile sound system). But the question is troublesome here, and should have been considered in the context of class certification, because these plaintiffs have used the credit cards (the tying product) and off-line debit cards (the tied product) in *different proportions;* fine jewelers, for example, would rarely be presented with an off-line debit card. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 83. The varying proportions of use create intractable conflicts among the four million merchants agglomerated as a class by the district court.

In my view: (1) The court's failure to decide how injury in fact would be measured was an error of law and thus an abuse of discretion; (2) the correct measure of injury is the extent to which a merchant would have paid less for the "package" of the tying and tied products in the absence of the tie; and (3) plaintiffs who use tied and tying products *in varying proportions* have conflicting interests in how the class goes about proving the *fact* that they would have paid less for their particular "package," as well as in showing the *extent* of any disparity. Since Rule 23(a) requires that members of a class "possess the same interest and suffer the same injury," class certification is not an option in this case. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

A. *The "Measure of Injury" Applied in the District Court*

The need to show injury to all class members has been problematic for plaintiffs from the outset, and their theory of injury has mutated as class counsel has tried gamely to fix the problem. The Second Amended Class Action Complaint

alleged that "absent the tie, virtually all members of the putative class would have *refused the off-line debit cards* and processed the same transactions using cash, checks, on-line debit, or other payment forms." *In re Visa Check/Master Money Antitrust Litig.*, 192 F.R.D. at 82 (emphasis added). In the course of briefing the class certification motion, however, defendants demonstrated that there could be no class-wide injury under that scenario because (*inter alia*) "even some named plaintiffs have testified that they would have continued to accept off-line debit cards at current prices even absent the tie." *Id.*

Plaintiffs then sponsored an expert's affidavit positing that all plaintiffs would have continued to accept off-line debit cards even absent the tie, but that the defendants would have charged a lower fee for them. *See id.* Specifically, the expert articulated the following theory of injury in fact: "in the 'but-for,' untied world," Visa and Mastercard "would have cut their interchange fees in order to preserve universal acceptance." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 82. "That move," according to the expert, "would have led merchants to accept the cards once again." *Id.* This theory thus posited "class-wide injury resulting from every single class member's overpaying for off-line debit cards as a direct result of the tie." *Id.* Plaintiffs supported their argument by pointing to tying cases that measure injury solely by the inflated price paid for the *tied* product. *See, e.g., Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir.1981) ("[T]he measure of damages is the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market."). *But see* X Phillip E. Areeda et al., *Antitrust Law* ¶ 1769c, at 430 (1996) (calling the "tied product" measure of injury "quite wrong").

Defendants responded that the tied product "overcharge" measure of injury is flawed because it ignores what would

happen to the price of the *tying* product in the untied world. "As a matter of elementary economic theory," defendants argued that a seller who "has market power in the tying product and overcharges on the tied product will do two things if the tie is broken: decrease the price of the tied product and increase the price of the tying product." *Id.* at 83. And since a plaintiff cannot show injury in fact if "his 'loss' from the defendant's violation is offset by his 'gain' in the very transaction he attacks," II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 365c, at 245 (rev. ed.1995), the defendants contended that the tying product price had to be considered. Several authorities agree that injury must be measured by reference to the "package" price of the two products. *See, e.g., Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.1982) ("[I]njury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value."); *accord* II Areeda & Hovenkamp, *supra* ¶ 383b, at 340-41 (approving this measure of injury). The issue is open in this Circuit. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 83 n. 13.

If credit card fees would have been higher in the untied world, certification would depend (as the district court fully recognized) on which measure of injury is adopted because under the "package" measure

> the fact of injury would no[t] be susceptible to class-wide proof. Specifically, merchants with relatively high amounts of credit card transactions vis a vis debit card transactions (e.g., jewelry stores) would have suffered little or no injury from the tie; indeed, they would have benefitted from it to the extent it kept credit card interchange fees down.

Id. at 83.

The district court did not decide which measure of injury applies, however, because in its view the question was obviated by a new proffer in plaintiffs' expert's *reply* declaration. According to plaintiff's new (third) conception of the untied world, defendants would have lowered off-line debit fees but "*would not have raised the credit card*" fees. *Id.* at 84 (emphasis added). The district court deemed this a "sufficient theory of class-wide injury under either the 'package' or the 'tied product' measure of injury" because under this theory even merchants with relatively high credit card volume would have been injured. *Id.* at 85 & n. 15. Accordingly, the district court saw no need to "choose between the competing line[s] of cases." *Id.*

The district court's refusal to decide how injury in fact would be measured was an error of law and thus an abuse of discretion. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir.1996) ("In order to make the findings required to certify a class action under Rule 23(b)(3) one must initially identify the substantive law issues that will control the outcome of the litigation."). The decision was critical to the class certification motion, and involved a pure question of law; no purpose was served by a delay pending future factual development.

If the court had decided this question, and decided (correctly) that injury is measured by the package price (rather than by the price of the tied product alone), *see* Part II.B below, it would have encountered a subtle problem, unique to *variable proportion* tying cases, that is fatal to certification, *see* Part II.C below.

B. *The Correct Measure of Injury*

I would hold that the correct measure of injury in fact is the package price of the tying and tied products. The statutory text compels this rule. The injury in fact requirement is derived from § 4 of the Clayton Act, 15 U.S.C. § 15, which

provides a damages cause of action only to plaintiffs who have been "injured in [their] business or property by" an antitrust violation. *Id.; see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981); II Areeda & Hovenkamp, *supra* ¶ 363, at 219-27. Awarding "damages to an uninjured plaintiff is inconsistent with the statutory requirement." II Areeda & Hovenkamp, *supra* ¶ 365c, at 247. Accordingly, "the tied buyer is injured in fact only when he is forced to pay above-market prices for the sum of the tying and tied products." X Areeda *et al.*, *supra* ¶ 1769c, at 430 (citation omitted).

The price of the tying product must be taken into account because it usually *does* rise if the tie is broken. A rational person cannot be made to pay more for a package of two products than he would pay for the two products separately. So if a tie causes the buyer to pay more than the market price for the tied product, the buyer is most likely paying less than the price that the seller could profitably charge for the tying product if sold separately. Otherwise, the buyer would avoid the tie.[5] And if somehow a plaintiff actually shows that

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[5] The Areeda treatise offers the following example:

> Suppose a defendant's profit maximizing price for product A alone is $100 and that the prevailing market price for product B is $20. If the defendant's version of product B is worth $1 less to the plaintiff than rival brands (or if a tie is otherwise burdensome in the amount of $1), the defendant tying the two together cannot profitably charge more than $119 for the package. Phrased another way: if he charges $25 for tied product A, he must *reduce the price of tying product A to $94.*

II Areeda & Hovenkamp, *supra* ¶ 365 at 246 n. 48 (emphasis added). Thus, if the tie is broken, the price of the tying product will *increase* back to $100.

This example describes a fixed proportion tie, but even in the variable proportion context "tied-product premiums are often offset by tying-product discounts below the price that would have prevailed without tying." X Areeda et al., *supra* ¶ 1769 at 431.

decoupling would cause the tying product price to *fall,* he should be entitled to recover that much more.

Based on the text of § 4 and these economic principles, "an increasing number of courts have correctly held that the purchaser has not been injured in fact, and thus cannot recover damages, unless he shows that the combined 'payment for both tying and tied products exceeds their combined fair market value.'" II Areeda & Hovenkamp, *supra* ¶ 383, at 341 (quoting *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.1982)) ("A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the [seller] for the tying product."); *see also Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir.1985) ("[U]nless the plaintiff shows that the package price was elevated the suit must be dismissed without further ado."); *Siegel v. Chicken Delight*, 448 F.2d 43, 52 (9th Cir.1971) ("To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained."). The competing line of cases, which measure injury by the price of the tied product alone, are, in Professor Areeda's phrase, "quite wrong." X Areeda, et al., *supra* ¶ 1769c, at 430.

C. *The "Package" Measure of Injury Applied to Variable Proportion Tying Cases*

If injury were measured (erroneously) by reference to the tied product alone, the interests of the class members would be aligned. Every class member processed at least some off-line debit transactions, so every class member would want the class representatives to prove that in the absence of the tie, the price of the tied product would have been as low as economic theory could support. The fact that the class

members happened to process credit cards and off-line debit cards in varying proportions would be irrelevant. Indeed, as compared to the "package" measure or to a non-price theory of injury, a "claim of overcharge *on the tied product* is the most likely prospect for common treatment of the fact of damage." John H. Matheson, *Class Action Tying Cases: A Framework for Certification Decisions*, 76 Nw. U.L.Rev. 855, 885-86 (1982) (emphasis added).

However, under the package measure described in Part II.B above, the variation among merchants of the proportion of sales using credit cards (versus off-line debit cards) has great bearing on proof of common injury. *See* Matheson, *supra* at 887; *cf.* Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 Vand. L.Rev. 213, 249-50 (1983) (concluding that buyers subject to "*variable proportion* tie-in[s]" cannot prove injury in fact on a class-wide basis, and suggesting as an alternative attack the use of offensive collateral estoppel under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (emphasis added)). To show injury, the class representatives will have to establish what *both* interchange fees would have been in the "but-for," untied world—and therein lies the conflict.

Any given set of credit and debit fees that class counsel might seek to prove would have different anticipated impacts (i) on the merchant whose debit-card sales predominate, (ii) on the merchant whose credit-card and debit-card sales are in parity, (iii) on the merchant whose credit-card sales predominate-and *on each merchant along the continuum.* In proving injury and damages, any given economic assumption or analysis will (as the case may be) enhance, impair or preclude the antitrust claim of a merchant depending on that merchant's location along the continuum.

Like other class members, the merchant whose *debit*-card sales predominate benefits by showing that the debit charge would have been much lower; but, *unlike* other class

members, the merchant whose debit-card sales predominate can still achieve a substantial recovery even if the price of credit would have risen by an even greater amount. Therefore, this merchant is not compelled to make the "'elusive and seldom attempted'" proof that "the sum of tying and tied product prices would have been lower" absent the tie. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 85 (quoting X Areeda et al., *supra* ¶ 1769b, at 429). (I illustrate the point with a numerical example in the margin.[6])

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[6] Suppose that the interchange fees in the tied world (the actual world) are $10 per $100 purchase for both credit cards and off-line debit cards (in fact, the percentages are much smaller but the $10 figure is useful for illustrative purposes). Thus, regardless of an individual merchant's mix of credit and debit, for every 100 transactions he pays 100 x $10 or $1000.

To establish injury in fact under the package measure, any merchant would have to show that in the untied world, he would have paid *less than* $1,000. As noted in the text, this will require establishing what *both* interchange fees would have been in the untied world, *i.e.*, the fee on credit cards would have been "$C" and the fee on off-line debit cards would have been "$D".

To assess the effect of different price combinations on the merchant "whose debit-card sales predominate," let us say that for every 100 transactions, he processes 30 by credit and 70 by off-line debit. In showing the *fact* of injury, this merchant could select (if provable) combinations of "$C" and "$D" that would sum *over* $20, thus obviating the need to make "'elusive and seldom attempted'" showing that "the sum of tying and tied product prices would have been lower" absent the tie. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 85 (quoting X Areeda et al., *supra* ¶ 1769b, at 429). For example, if C = $19 and D = $5, then C + D would be $24 but this merchant would have been injured in fact by $150 (30 x $19 + 70 x $4 = $570 + $280 = $850).

In terms of the *extent* of his injury, the 30%/70% merchant would greatly prefer a theory positing that C would have been $16 and D would have been $3 to a theory that the prices would have been $10 and $9, even though in both cases the sum would be $19. He could recover $310 under the former version of events (30 x $16 + 70 x $3 = $690), but only $70 under the latter (30 x $10 + 70 x $9 = $930).

In contrast, the merchant whose credit-card and debit-card sales are in parity would get nothing if decoupling caused credit charges to rise by as much as debit prices fell. To establish injury in fact, this merchant would be compelled to undertake the "'elusive and seldom attempted'" proof that the sum of the untied prices would have been lower. As to the extent of injury, he would be indifferent to the *relative* prices of credit and debit and would do best by proving that the combination would have been as low as possible.[7]

The merchant whose *credit*-card sales predominate faces the toughest constraints. For this merchant, it is necessary but insufficient to make the "'elusive and seldom attempted'" proof that the sum of the prices would have been lower. He would need to argue also that decoupling would cause the debit price to fall without causing any appreciable rise in the credit price, because even a minuscule rise in the credit price would neutralize a reduction (even a gross reduction) in the debit price. This is a tough row to hoe.[8] (This is plaintiff's

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[7] By plugging in the hypothetical prices of credit and debit discussed in the previous footnote, it is easy to see how the interests of this merchant differ from those of the merchant whose debit sales predominate. For every 100 transactions, this merchant processes 50 credit sales and 50 debit sales. If C would have been $19 and D $4, this merchant would actually have paid *more* in the untied world then he did under the tie (50 x $19 + 50 x $4 = $1,150). In the words of the district court, he "would have benefitted from [the tie] to the extent it kept credit card interchange fees down." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 83.

And while the respective prices of credit and debit mattered a great deal to 30%/70% merchant in showing the *extent* of injury, they would not matter at all to the 50%/50% merchant. The latter would recover $50 by advancing an economic theory that the prices would have been $16 and $3 (50 x $16 + 50 x $3 = $950) or $10 and $ 9 (50 x $10 + 50 x $9 = $950). The 50%/50% merchant could make a disinterested determination of which of the two theories would be easier to prove.

[8] Assume that this merchant processed 70 credit transactions for every 30 debit sales. If decoupling would have resulted in prices of $19 and $4, then this merchant would have been *hurt* by a whopping $450

third theory, the one first advanced in the reply affidavit of plaintiffs' expert.)

The three merchants at these three points on the continuum thus have different cases; their anticipated recoveries depend on and are maximized by different theories and economic assumptions; those theories and assumptions are incompatible or (at best) incoherent when advanced at once; there are winners and losers within the class; and the distribution of these competing interests creates a problem that cannot be resolved by *sub*class representatives even if one had a thousand of them. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (members of a class must "possess the same interest and suffer the same injury"); *General Tel. Co. v. Falcon*, 457 U.S. 147, 156-57 & n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). As far as I can see, the only unified interests served by herding these competing claims into one class are the interests served by settlement: (i) the interest of class counsel in fees, and (ii) the interest of defendants (perhaps later in the litigation) in a bundled group of all possible claimants who can be precluded by a single payment.

Certification does no service for the absent class members' claims, viewed separately. Already, the difficulty of having to prove injury under the package measure has led plaintiffs' counsel to propose a least-common-denominator analysis that

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(70 x $19 + 30 x $4 = $1,450). He also would have been hurt if the prices had been $16 and $3 (70 x $16 + 30 x $3 = $1,210) or even $16 and *$0* because 70 x $16 is more than $1000. On the other hand, if the prices were $10 and $9, he could recover $30 (70 x $10 + 30 x $9 = $970), placing his preferences directly at odds with the preferences of the 30/70 merchant (who preferred the $16 and $3 prices to the $10 and $9). By extension, a merchant whose ratio of credit to off-line debit transactions was extremely high would not be able to recover under *any* theory positing a credit card fee of over $10 unless the debit card fee became virtually a free good.

is theoretically capable of bestowing some benefit on all class members, to the detriment of class members who would have a superior claim of recovery under other, competing analyses. Thus, plaintiffs undertake to make the "'elusive and seldom attempted'" showing that the sum of the two fees would have been lower *and* that the credit card price would not have risen at all. If, as plaintiffs' counsel evidently believes, this analysis is the only way to keep the class together, I take the point as proven that the interests of the class members are fractured and conflicted. As to the analysis itself, I have no view of its merits in this particular case. But for most *absent* members of the class, the analysis is unnecessary and impedes recovery under other theories that offer better prospects of recovery.

In light of the intractable conflict, I would order the district court to decertify the class. But lacking a majority on this Court for that result, I am relieved to think that the certification order is conditional and that nothing inhibits the district court from considering and reconsidering all of these issues over time, as indeed the district court is evidently disposed to do.

III.
Conclusion

The majority opinion exudes confidence that there is some way to bring this unmanageable and conflict-ridden litigation to an end, and that it will materialize one day in the district court. I think that is probably right, but I intuit that the only case-management tool that will bring about that end will be settlement, and that it will be coerced by abuses that Rule 23(f) was specifically designed to correct.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. 96-CV-5238 (JG).

In re VISA CHECK/MASTERMONEY
ANTITRUST LITIGATION.

Feb. 22, 2000.

MEMORANDUM AND ORDER

GLEESON, District Judge.

In this antitrust action, several of the nation's largest retailers, joined by a number of smaller merchants and three retail associations, challenge rules issued by defendants Visa and MasterCard that require stores accepting defendants' credit cards to also accept their debit cards. Plaintiffs allege that this is a tying arrangement, and that it is *per se* illegal under § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. They also contend that defendants have attempted and conspired to monopolize the debit card market in violation § 2 of the Sherman Act, 15 U.S.C. § 2.

Plaintiffs have moved for certification of their case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, with the proposed class comprising all individuals and businesses that have accepted Visa and/or MasterCard credit cards, and have therefore been required to accept the debit cards, within the statute of limitations period. Defendants oppose the motion and have themselves moved to strike the expert opinion submitted by plaintiffs in support of class

certification. For the reasons discussed below, the motion to certify the class is granted, and the motion to strike the expert is denied.

I. BACKGROUND

The plaintiffs in this action include Wal-Mart Stores, Sears Roebuck, Safeway, Circuit City, the National Retail Federation, and a number of other merchants, large and small.[1] The defendants are Visa U.S.A. ("Visa") and MasterCard International ("MasterCard"), associations owned and run by member financial institutions in order to license payment cards with the Visa and MasterCard logos and set some of the rules governing the handling of card transactions.

The following factual background is drawn from the plaintiffs' Second Amended Consolidated Class Action Complaint ("Complaint"). Many of these assertions are of course vigorously disputed by the defendants.

A. *Visa and MasterCard*

All major American banks are members of both Visa and MasterCard, resulting in a 95 percent overlap in membership between the two associations. (Complaint ¶ 43.) Likewise, nearly every merchant that accepts Visa also accepts MasterCard, and vice versa. (*Id.*) These facts lead to a phenomenon referred to as duality, in which Visa and MasterCard do not compete against each other and in fact coordinate many of their policies. (*Id.* ¶¶ 44-45.)

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[1] The full list of plaintiffs is: Wal-Mart Stores, The Limited, Sears Roebuck, Safeway, Circuit City, the International Mass Retail Association, the National Retail Federation, the Food Marketing Institute, Bernie's Army-Navy Store, Auto-Lab of Farmington Hills, Burlington Coat Factory Warehouse, Sportstop, Payless Shoesource, Shoes, Etc., the Coffee Stop, UCC Kwik Doc, Computer Supplies Unlimited, Denture Specialist, Inc./ Geneva White D.M.D., Shark 3 Audio, 53, Inc., and Scrub Shop.

B. *Visa and MasterCard Transactions*

Visa and MasterCard do not issue payment cards; they license member banks to do so. (*Id.* ¶ 8(m).) Those "card-issuing institutions" independently set cardholders' interest rates and fees, although the policy of "duality" has "facilitated a high degree of uniformity" in those numbers. (*Id.* ¶¶ 8(m), 44.) Likewise, member financial institutions independently contract with retailers to accept the cards. (*Id.* ¶ 8(n).) Referred to in this capacity as "acquiring institutions," they reimburse merchants for every Visa and MasterCard purchase, less a "discount fee." [2] (*Id.* ¶¶ 8(n), 8(p).) The discount fee is largely based on the "interchange fee," the fee that the acquiring institution pays the card-issuing institution every time it processes a payment by one of the card-issuing institution's cardholders at one of the acquiring institution's retailers. (*Id.* ¶ 8(*o*).) The "interchange fee" is set by Visa and MasterCard.[3] (*Id.*)

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[2] A bank can function as both a card-issuing institution and an acquiring institution. (*Id.* ¶ 7.)

[3] The complaint includes the following illustration of the chain of transactions:

> Bank A issues a Visa credit card to Consumer X, who purchases a garment for $100 at Store Y, which was "acquired" for Visa by Bank B. Visa rules mandate that Bank B must pay Bank A an interchange fee of 1.25% of the amount of the transaction, *i.e.*, $1.25. Bank B will charge Store Y a "discount fee" higher than $1.25 in order to recover the mandated interchange fee and other fees that Visa rules mandate Bank B to pay Visa on each and every Visa credit card (and debit card) transaction and to earn a profit for itself. Thus, Bank B may charge a discount fee of 1.60% of the transaction amount (or $1.60) to Store Y. When Store Y presents Consumer X's $100 Visa transaction to Bank B, the bank will credit Store Y's account for $98.40, send the Visa mandated $1.25 interchange fee to Bank A and retain the $.35 balance of the "discount fee."

(*Id.* ¶ 8(*o*).)

C. *Payment Cards*

Payment cards come in a variety of forms. A credit card, such as a Visa or MasterCard credit card, allows a cardholder to make a purchase and pay off his card-issuing institution off over time. (*Id.* ¶ 8(d).) A "charge card" or "travel and entertainment card," such as American Express's green card, allows its holder to make a purchase on credit that extends only to the end of the monthly payment period. A debit card allows a holder to access his bank account directly. (*Id.* ¶ 8(f).) A debit card might be an ATM card, which enables the holder to withdraw cash from an ATM, or a "POS debit card," which can be used to make a purchase at the "point of sale," or both. (*Id.* ¶¶ 8(g), 8(h).)

POS debit card transactions are effectuated in one of two ways: "on-line" or "off-line." In a debit transaction completed on-line, the cardholder enters his "personal identification number" or "PIN" into a PIN pad; the card-issuing institution verifies that there are sufficient funds present in the cardholder's account; puts a "hold" on those funds; and transfers the money to the retailer's account within a day. (*Id.* ¶ 8(k).) On-line debit networks include NYCE, MOST, Pulse, and Shazam. (*Id.*) In a debit transaction completed off-line, the cardholder does not enter a PIN but rather signs a slip as she would if paying by credit card. (*Id.* ¶ 8(*l*).) The card-issuing bank may or may not check the sufficiency of funds; may or may not put a hold on the purchase price; and will transfer the money from the cardholder's account to the retailer's in one to seven days. (*Id.*) Off-line debit transactions are less secure than those completed on-line, principally because fraud is more likely when a signature, as opposed to a PIN, is required. (*Id.* ¶ 56.) The VisaCheck and MasterMoney cards, which are at the center of this litigation, are off-line POS debit cards. (*Id.* ¶ 8(e).)

D. *Visa and MasterCard Entry Into the Debit Card Market*

Visa and MasterCard dominate the credit card market. By 1979, their share of the credit card market exceeded 90 percent; if the market is defined more broadly to include charge cards, such as American Express, the share for Visa and MasterCard exceeded 70 percent. (*Id.* ¶ 47.) So prevalent were Visa and MasterCard that most retailers felt compelled to accept them. (*Id.*) Visa and MasterCard member institutions took advantage of the cards' dominating position, and the members' ability to coordinate action, to erect barriers to entry for potential competitors. (*Id.* ¶¶ 49-54.)

In 1979, Visa and MasterCard launched their off-line POS debit cards, VisaCheck and MasterMoney, respectively. (*Id.* ¶ 65.) Pursuant to the defendants' "honor all cards" rule, any merchant accepting Visa or MasterCard credit cards was contractually obligated to accept VisaCheck and MasterMoney as well. (*Id.* ¶ 66.) Also linked were the interchange fees: Visa and MasterCard set them for the off-line POS debit cards at the same level as for credit cards. (*Id.* ¶ 67.) This equivalence occurred notwithstanding the fact that credit cards are much more expensive for banks (due to the risks inherent in extending credit) than are debit cards. (*Id.* ¶ 68.) The fees associated with the Visa and MasterCard off-line POS debit cards far exceeded the fees for competing on-line POS debit networks. For example, in 1996 the interchange fee on a $100 retail transaction (at a non-supermarket) was $1.10 for a VisaCheck transaction or $1.31 for a MasterMoney transaction, but only $.05 for a MOST transaction. (*Id.* ¶ 69.) Without the tie to credit cards, the plaintiffs allege that "[r]etailers would not pay these fixed, supra-competitive and extortionate VisaCheck and MasterMoney rates." (*Id.* ¶ 73.)

In 1996, there were 1.2 billion retail transactions involving VisaCheck or MasterMoney, totalling $46 billion. (*Id.* ¶ 79.)

These payment options are fungible with cash, checks, travelers checks, and on-line POS debit cards; therefore, retailers would have lost virtually none of those $46 billion in sales if they had not accepted VisaCheck or MasterMoney. The interchange fees on these transactions were $580 million; the costs incurred by retailers had they been able to refuse VisaCheck and MasterMoney and have customers pay through one of the other listed means would have been only $90 million. (*Id.* ¶¶ 82-83.)

Visa and MasterCard have undertaken a number of measures to "deceive" retailers about the off-line POS debit cards. (*Id.* ¶ 89.) They designed them to be "visually and electronically indistinguishable" from credit cards so that retailers would not even know they were accepting a different form of payment, and they set the interchange fees at the same level for debit and credit so that retailers would not notice the difference when they were billed.[4] (*Id.* ¶¶ 92-93.) Since as early as 1982, numerous merchants discovered that they were accepting the cards, despite the "campaign of concealment," and complained about it. But all were told that they must accept the cards if they wish to remain eligible for Visa and MasterCard credit cards. (*Id.* ¶¶ 98-110.)

In order to protect their positions in the growing market for debit payments, Visa and MasterCard set out to eliminate the competition offered by the "cheaper, faster and safer" on-line POS debit networks. (*Id.* ¶¶ 75, 113.) The efforts are succeeding. In 1995, the number of VisaCheck/MasterMoney transactions increased by 80 percent over 1994, while on-line POS debit transactions increased by only 40 percent. (*Id.* ¶ 119.) At the end of 1996, the defendants' off-line POS debit cards had captured 65 percent of the POS debit card market. (*Id.* ¶ 120.)

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[4] In 1994, Visa adopted a slightly different interchange fee for debit and credit, while MasterCard has continued to charge the same rate. (*Id.* ¶¶ 95-97.)

E. *This Action*

The plaintiffs allege that the contractual requirement that they accept Visa and MasterCard debit cards along with the credit cards is an illegal tie pursuant to § 1 of the Sherman Act, 15 U.S.C. § 1. They also contend that the defendants have attempted and conspired to monopolize the debit card market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. The plaintiffs seek an injunction ending the alleged tie and treble damages.

Plaintiffs now move to certify a class of approximately four million merchants who have accepted Visa or MasterCard credit cards and who therefore have been required to accept VisaCheck or MasterMoney.

F. *The Expert Reports*

Both sides have introduced expert reports to support their respective positions in favor of and in opposition to class certification. Their analyses are summarized in brief here.

1. *Dennis W. Carlton: Opening Report*

The plaintiff's expert is Dennis W. Carlton, a professor of economics at the University of Chicago's Graduate School of Business, who has published widely on industrial organization, antitrust topics, and the credit card industry. Assuming the allegations in the plaintiffs' complaint are true, Carlton concludes that three central issues (whether credit and debit cards are distinct products; whether Visa and/or MasterCard have market power in credit cards; and whether the tying policy injures all class members) are appropriate for class-wide determination. (Declaration of Dennis W. Carlton, Ph.D. in Support of Plaintiffs' Motion for Class Certification ("Carlton Declaration"), ¶ 4, 7.)

First, determining whether credit cards and debit cards are distinct products will turn on the objective characteristics of

the products, which influence consumer attitudes, which in turn influence retailer attitudes. (*Id.* ¶ 10.) It would be "highly duplicative," according to Carlton, to conduct this inquiry on a merchant-by-merchant basis. (*Id.*)

Second, determining whether the defendants, either individually or jointly, have market power in the credit card market would be best accomplished on a class-wide basis, according to Carlton. (*Id.* ¶ 16.) Market power can sometimes be demonstrated (at least in part) through market share; defendants' market share by definition does not vary across members of the class. (*Id.* ¶ 20.) Another test of market power is the ability to engage in price discrimination; again, whether or not the defendants have that ability is a question subject to class-wide determination. (*Id.* ¶ 23.)

Third, Carlton concludes that the question of injury resulting from the complained-of tie is susceptible to class-wide determination. (*Id.* ¶ 24.) He starts with the plaintiffs' assertion that, absent the tying arrangement, a large number of retailers would have refused to accept the Visa and MasterCard off-line POS debit cards. In that event, "Visa and MasterCard likely would have found it in their interest to reduce their interchange fees in order to maintain merchant acceptance of these cards." (*Id.* ¶ 29.) As a result, all class members have suffered an injury as a result of the tie, namely, the payment of a higher interchange fee for VisaCheck and MasterMoney than they would have paid absent the tie. (*Id.* ¶ 16.) Moreover, Carlton asserts that the determination of the plaintiffs' claim that retailers have been injured by defendants' efforts to limit the volume of on-line debit transactions can be made on a class-wide basis. (*Id.* ¶ 30.)

Finally, Carlton concludes that damages could be calculated using a common formula based on his theory of injury: but for the tying arrangement, interchange fees for off-line debit would be lower. (*Id.* ¶ 33.) Carlton estimates

that in this "but-for" world the interchange fees for off-line debit would be comparable to that for on-line debit; an individual merchant's damages could therefore be calculated by measuring the overcharge it had paid on all the off-line debit transactions it accepted. (*Id.* ¶ 34-35.)

2. *Richard L. Schmalensee*

The defendants' expert is Richard L. Schmalensee, the dean of the Sloan School of Management at the Massachusetts Institute of Technology and the Billard professor of economics and management. Like Carlton, Schmalensee has published widely on industrial organization, antitrust topics, and the credit card industry.

Schmalensee's principal attack addresses Carlton's theory of injury anddamages. He concludes that Carlton's "but-for" analysis is grossly over-simplified and does not account for a ripple effect of consequences that would have flowed from an end to the tie, resulting in different costs and benefits for different merchants. First, Schmalensee concludes that a dramatic reduction in off-line debit interchange fees would have resulted in many fewer banks issuing many fewer cards. (Declaration of Richard L. Schmalensee, Ph.D. in Support of Defendants' Opposition to Class Certification and Defendants' Motion to Strike the Declaration of Dennis W. Carlton, Ph.D. ("Schmalensee Declaration"), ¶ 60.) With the lower interchange fees, Visa also would likely have spent far less than the $100 million it has spent advertising VisaCheck since 1992, resulting in even less usage. (*Id.* ¶ 67.) With fewer cards in circulation, less promotion, and an end to the tie, fewer merchants would accept the off-line POS debit cards, notwithstanding the lower interchange fees. (*Id.* ¶ 70.)

Schmalensee suggests another consequence of Carlton's "but-for" world: an increase in *credit card* interchange fees. "As a matter of elementary economics, changing the terms of a tied sale (*e.g.*, untying the products and unbundling the

prices) generally has to affect the prices of both the tied *and* the tying product if it is to have any effect on price." (*Id.* ¶ 74.) This is because a merchant purchasing the two tied products must have concluded that it is willing to pay the aggregate price for the two products. If it is paying *more* than it would like for the tied product, it must be paying *less* than it would be willing to for the tying product, or else it would not complete the transaction. (*Id.*)

Based on these conclusions, Schmalensee contends that there would be "winners" and "losers" in the untied, "but-for" world. The factors determining whether a particular merchant would win or lose in the but-for world (and the measure of its win or loss) are its mix of credit and debit transactions; the level of incremental sales it generates by accepting off-line debit; its incremental profit margin on those sales; and the payment methods (and their costs) its customers would use instead of off-line debit. (*Id.* ¶¶ 90-107.) Because these factors will vary widely among merchants, the existence and extent of plaintiffs' injuries are not amenable to class-wide determination. (*Id.* ¶¶ 112-35.) Similarly, the existence of these variables makes the accurate calculation of damages by a class-wide formula impossible. (*Id.* ¶ 136-42.)

Schmalensee also contends that the other issues Carlton addresses (whether debit and credit cards are distinct products and whether defendants possess market power) cannot be established on a class-wide basis. Cardholders may see debit and credit cards as substitutes for each other at certain classes of retailers, but not at others. (*Id.* ¶ 147-48.) Moreover, defendants' market power may be greater or lesser when considered relative to merchants of different sizes or types. (*Id.* ¶ 149-52.)

3. *Carlton's Reply*

In his reply declaration, Carlton challenges Schmalensee's contentions, using both empirical and theoretical arguments.

First, he disputes Schmalensee's argument that, in the "but-for" world of lower debit card interchange fees, banks would have issued fewer of the cards and there would have been less promotion, resulting in an overall decrease in transaction volume. He points to Visa's experience with Interlink, its on-line debit card.[5] In April 1997, Visa dramatically lowered the interchange fees for Interlink transactions. Depending on the size of a given transaction, the reduction was as much as 75 percent. After this move, the number of Interlink transactions and merchants accepting the card *rose,* the opposite of what Schmalensee's model would have predicted. (Reply Declaration of Dennis W. Carlton in Support of Plaintiffs' Motion for Class Certification ("Carlton Reply"), ¶ 17.) Visa also cut its interchange fees for the off-line debit card in 1992, yet usage has increased dramatically since that time. (*Id.* ¶ 18.) Carlton also notes that one of the original purposes of debit cards was to help banks reduce the high cost of processing checks; that incentive would remain, even if interchange fees fell. (*Id.* ¶ 20.) Finally, banks could make up for lower interchange fees by assessing cardholders annual fees or transaction fees. (*Id.* ¶ 22.)

Second, Carlton disputes Schmalensee's assertion that, assuming market power in the credit card market, an end to the tie would lead to an increase in credit card interchange fees, which would in turn create "winners" and "losers" among merchants. Carlton first cites two empirical "benchmarks" in disputing Schmalensee's conclusion. He points to Canada, where banks do not issue off-line debit cards and their use by consumers is rare. All else being equal, credit card interchange fees should be higher in Canada, according to Schmalensee's model, because there effectively is no tie. Yet, credit card interchange fees in Canada are *lower* than in

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[5] This card, along with MasterCard's on-line Maestro card, is not subject to the "honor all cards" rule. Only merchants with PIN pads are equipped to accept these cards.

the United States. (*Id.* ¶ 27-30.) As a second "benchmark," Carlton offers historical evidence from the United States. Between 1991 and 1998, off-line debit transactions increased many times over. All else being equal, credit card interchange fees should have declined during this period, according to Schmalensee's model. Specifically, as the volume of off-line debit card transactions increased, merchants would have to be compensated for the high interchange fees with a diminution in the interchange rates for the tying product. Yet the credit card interchange fees generally stayed the same or increased (when adjusted for inflation) during that period (*Id.* ¶ 31.)

Carlton also disputes Schmalensee's assertions regarding credit card interchange fees as a matter of economic theory. Carlton contends that Schmalensee's model was limited to situations in which the tying and tied products are sold in fixed proportions and are independently demanded. (*Id.* ¶ 34.) Models applicable in other settings, Carlton asserts, do not predict an increase in the price of the tying product when the tie is broken. In fact, one model, in which the seller possesses market power in both the tying and tied product, actually predicts a decline in price for *both* products when the tie is broken. (*Id.* ¶ 35.)

Finally, Carlton disputes Schmalensee's conclusions that market power and definition are not susceptible to class-wide proof. (*Id.* ¶ 42-48.)

II. DISCUSSION

A. *The Motion to Strike*

The defendants have moved to strike Carlton's expert opinion based on Federal Rule of Evidence 702, as construed by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

Specifically, they contend that Carlton's opinion is inadmissible because it is "legally irrelevant and not rationally based on the pertinent facts or on any analysis." (Memorandum of Law in Support of Defendants' Motion to Strike Opinions Offered by Dennis W. Carlton, at 1.)

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist *the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702 (emphasis added). *Daubert*, on which the defendants rely, involved "the standard for admitting expert scientific testimony *in a federal trial.*" 509 U.S. at 582, 113 S.Ct. 2786 (emphasis added).

As the highlighted phrases indicate, the *Daubert* inquiry was designed to shield the fact-finder at trial from flawed evidence. We are obviously not at trial; the parties have not even filed dispositive motions yet. In this preliminary stage of the case, I am very far from the "trier of fact" contemplated in Rule 702. Indeed, I am expressly forbidden from engaging in "a preliminary inquiry into the merits" of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). In particular, a court at the class certification stage should not delve into the merits of an expert's opinion, or indulge "dueling" between opposing experts. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir.1999) (quoting *Krueger v. New York Tel. Co.*, 163 F.R.D. 433, 440-41 (S.D.N.Y.1995)), *petition for cert. filed*, (U.S. Dec. 27, 1999) (No. 99-1084).

Notwithstanding these distinctions, the defendants contend, and I agree, that there is a role for a *Daubert* inquiry at the class certification stage. It cannot be that a court could certify

a class (in this case of approximately four million members) on the basis of an expert opinion so flawed that it is inadmissible as a matter of law. Although there is a role for a *Daubert* test here, it is a limited one, tailored to the purpose for which the expert opinion is offered. The question is not, therefore, whether a jury at trial should be permitted to rely on Carlton's report to find facts as to liability, but rather whether I may utilize it in deciding whether the requisites of Rule 23 have been met.[6]

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[6] For these reasons, the defendants' reliance on *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), is misplaced. The language cited by defendants did not involve questions of admissibility at all, and certainly not at the class certification stage. Instead, the Supreme Court held that the expert economic opinions provided by plaintiffs in those cases were insufficient to withstand judgment as a matter of law. *See Brooke Group*, 509 U.S. at 242, 113 S.Ct. 2578 (expert opinion not supported by facts in the record "cannot support a jury's verdict"); *Matsushita*, 475 U.S. at 594 n. 19, 106 S.Ct. 1348 (expert opinion based on "implausible" assumptions inconsistent with record evidence insufficient to create genuine issue of material fact to withstand summary judgment). Another case relied upon by defendants, *In re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497 (D.Kan.1995), was decided under *Daubert*, but it decided a motion in limine before trial, not at the class certification stage. In that relatively fact-rich context, the court held the proffered expert opinion inadmissible because it was offered only "to plug evidentiary holes in plaintiffs' case, to speculate, and to surmise." *Id.* at 1506.

Finally, defendants rely on *In re Agricultural Chemicals Antitrust Litigation*, No. 94-40216-MMP, 1995 WL 787538 (N.D.Fla. Oct. 23, 1995). In denying class certification, that court did not rely on *Daubert*, but instead engaged in a lengthy, substantive critique of the findings of plaintiffs' expert. *See id.* at *5—*11. That kind of inquiry is not permitted in this circuit on a motion for class certification. *See Caridad*, 191 F.3d at 292; *see also In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 621 (N.D.Ga.1997) (criticizing *Agricultural Chemicals* for "performing a function that is . . . best reserved for a fact-finding stage of the proceedings").

Under the *Daubert* standard, as it is typically applied at trial, "judges are charged with ensuring that expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *Zuchowicz v. United States*, 140 F.3d 381, 386 (2d Cir.1998) (quoting *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786). In fulfilling this "gatekeeper" role, a judge is charged with making a "preliminary assessment" of the testimony's "reasoning or methodology" and whether that reasoning or methodology "properly can be applied to the facts in issue." *Id.* (quoting *Daubert*, 509 U.S. at 592-93, 113 S.Ct. 2786).

The Supreme Court has provided a non-exhaustive list of factors to consider in what should be a "flexible" inquiry by the district court:

> (1) whether the theory can be (and has been) tested according to the scientific method; (2) whether the theory or technique has been subjected to peer review and publication; (3) in the case of a particular scientific technique, the known or potential error rate; and (4) whether the theory is generally accepted.

Id. (citing *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786).

The *Daubert* gate-keeping function applies even in the case of a non-scientific expert. *See Kumho Tire*, 119 S.Ct. at 1175. In such cases, the *Daubert* factors may or may not be applicable; "the gatekeeping inquiry must be tied to the facts of a particular case." *Id.* (internal quotation marks omitted).

The defendants attack Carlton's opinion on several grounds: (1) it is based on supposition rather than empirical proof; (2) he fails to analyze what would happen to the price of the "tying" product (credit cards) if the tie was broken, instead focusing exclusively on his contention that the price of the "tied" product (debit cards) would decline; (3) he fails to account for the complexities of the interactions between different players in the plastic card market and how they would be affected by an end to the "honor all cards" rule; (4)

he fails to account for the possibility that, if the tie is broken, the defendants might charge different debit interchange fees to different merchants; and (5) he fails to account for the possibility that if interchange fees decline for debit cards, the volume of transactions would decline.

These contentions might or might not have force at a later stage if the defendants challenge the admissibility of Carlton's opinion. But the admissibility inquiry under *Daubert* and *Kumho Tire* must be adapted to the facts of the case at hand and to the stage of the proceedings. I find that Carlton's opinion is admissible for the narrow purpose for which it is offered: to support the plaintiffs' class certification motion. Carlton's qualifications (which defendants do not challenge) are impeccable.[7] The fact that his report is based principally on economic theory, not exhaustive empirical or quantitative analysis, is no bar to its admission at this stage; if it were, Schmalensee's opinion would be inadmissible as well. Moreover, the defendants have not shown that Carlton has failed to "rely upon the type of methodology and data typically used and accepted" in cases such as this one. *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir.1994). The gravamen of defendants' motion is that they (and their expert) disagree with Carlton's

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[7] Carlton graduated *summa cum laude* with a degree in applied math and economics from Harvard College in 1972; he went on to earn a Ph.D. from the Massachusetts Institute of Technology ("MIT") in economics in 1975. He has served on the faculty at MIT (economics department) and at the University of Chicago (economics department, law school and (from 1984 to present) graduate school of business). He serves as the co-editor of the *Journal of Law and Economics,* has written two books, and has published more than fifty scholarly articles. He and Schmalensee were the two outside economists retained to assist in the Department of Justice's preparation of its 1992 Horizontal Merger Guidelines. Carlton was also a scholar in residence at the Federal Reserve, where he lectured on the credit card industry. (Carlton Declaration, Exhibit A; Schmalensee Declaration, ¶ 8.)

conclusions; that is not a basis for exclusion. In sum, defendants have fallen far short of showing that Carlton's opinion is the kind of "junk science" that a *Daubert* inquiry at this preliminary stage ought to screen. *See id.* (quoting *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir.1993)). The defendants' motion to strike is denied.

B. *The Class Certification Motion*

1. *Class Actions*

a. *General Standards*

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). The class device is designed for cases in which the "issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class." *Id.* (quoting *Califano*, 442 U.S. at 701, 99 S.Ct. 2545) (internal quotation marks omitted). In those cases, a class action can conserve the resources of both the courts and the parties. *See id.*

Pursuant to Federal Rule of Civil Procedure 23(a), a class action may be initiated if four requirements are met:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

Additionally, a class action may only be "maintained" if the four requirements of Rule 23(a) are met and one of the tests of Rule 23(b) is satisfied.[8] Rule 23(b)(2) allows maintenance of a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed.R.Civ.P. 23(b)(2). In the alternative, Rule 23(b)(3) allows maintenance of a class action if

> the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesireability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

The party seeking to certify a class bears the burden of establishing the prerequisites of Rule 23. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Caridad v. Metro-North Commuter RR*, 191 F.3d 283, 291 (2d Cir.1999), *petition for cert. filed*, (U.S. Dec. 27, 1999) (No. 99-1084). A court may certify a class action only if it is "satisfied, after a rigorous analysis," that the rule's prerequisites have been established. *Falcon*,

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[8] The plaintiffs do not assert Rule 23(b)(1) as a basis for maintaining this class action.

457 U.S. at 161, 102 S.Ct. 2364. This analysis will inevitably be "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 160, 102 S.Ct. 2364 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)). In some cases, it may be possible to conduct the required inquiry by looking no further than the pleadings, but in other instances, the court may be required to "probe behind the pleadings before coming to rest on the certification question." *Id.* In some cases in the latter group, it will be necessary to conduct discovery to establish a sufficient evidentiary record from which to make the class determination. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir.1982).

Notwithstanding the district court's ability to look beyond the pleadings, its resolution of a class certification motion may not become "a preliminary inquiry into the merits" of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 178, 94 S.Ct. 2140 (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir.1971)). In sum, a court considering a class certification motion "must look somewhere between the pleading and the fruit of discovery . . . . [E]nough must be laid bare to let the judge survey the factual scene on a kind of sketchy relief map, leaving for later view the myriad of details that cover the terrain." *Sirota*, 673 F.2d at 571-72 (quoting *Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 (S.D.N.Y.1974)).

b. *Class Actions and Expert Opinions*

In this circuit, a district court is not permitted to indulge "dueling" between opposing experts at the class certification stage. *Caridad*, 191 F.3d at 292 (quoting *Krueger v. New*

York Tel. Co., 163 F.R.D. 433, 440-41 (S.D.N.Y.1995)). Because *Caridad* is the Second Circuit's latest word on this question, extended discussion of that opinion, and the district court opinion that led to it, is warranted.

The plaintiffs in the case were 25 present or former employees of Metro-North, each alleging a company-wide policy of discrimination against African-Americans. *See Robinson v. Metro-North Commuter R.R. Co.*, 175 F.R.D. 46, 47 (S.D.N.Y.1997), *rev'd sub. nom., Caridad*, 191 F.3d 283. They sought to certify a class of all African-American employees at Metro-North from 1983 to 1996 who held union or lower- to middle-level management positions. *See id.*

In support of their motion, the plaintiffs submitted a statistical analysis showing that African-American employees faced discipline from Metro-North with more frequency than other employees and were promoted less often. *See id.* at 48. The district court rejected this analysis as a basis for establishing "commonality" under Rule 23(a) because, as shown by defendant's expert, it failed to take into consideration the widely varying rates of discipline and promotion by position at Metro-North.[9] *See id.* at 48. When those differences were added to the analysis, "no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North." *Id.* Moreover, the court saw a more "fundamental" problem with class certification. The gravamen of the complaint was that Metro-North's policy of "overdelegation" of promotion and

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[9] In particular, 25 of the 37 departments at Metro-North had no disciplinary cases at all during the relevant time period. *See Caridad*, 191 F.3d at 288. In addition, the defendant's expert contended that the plaintiffs' expert failed to take into account "non-promotable positions." If jobs for which the rate of promotion was under one percent were excluded, the difference in promotion rates between whites and blacks disappeared. *See id.* at 289.

discipline decisions allowed individual managers to discriminate. Without the statistical proof that the court had rejected, there was no evidence that this practice led to "generalized discrimination" at the company. Thus class treatment was inappropriate. *Id.* at 49.

In an opinion written by Judge Newman, the Second Circuit reversed. *See Caridad*, 191 F.3d at 283. The court noted that it would likely be "extremely difficult" for the plaintiffs to prove that Metro-North's grant of discretionary authority "affects one class of employees more harshly than others." *Id.* at 291. Nonetheless, the court concluded that "the statistical report and anecdotal evidence submitted by the Class Plaintiffs are sufficient to demonstrate common questions of fact regarding the discriminatory implementation and effects of Metro-North's company-wide policies regarding promotion and discipline." *Id.* at 292. The court noted the critique of plaintiffs' statistics credited by the district court, but cautioned that "this sort of 'statistical dueling' is not relevant to the certification determination." *Id.* (quoting *Krueger*, 163 F.R.D. at 440-41). The critique "may prove fatal at the merits stage, but the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits." *Id.; see also id.* at 293 ("More detailed statistics might be required to sustain the Plaintiff's burden of persuasion, but this report, in conjunction with the anecdotal evidence, satisfies the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification." (internal citation omitted)).

The court ended its discussion with the following instructions to district courts:

> In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class. Here, the District Court credited Metro-North's expert evidence over that of the Class Plaintiffs.

> Such a weighing of the evidence is not appropriate at this stage in the litigation.

Id. (internal citation omitted).[10]

2. *The Antitrust Claims*

I will now briefly summarize the elements of the plaintiffs' two causes of action.[11]

a. *Illegal Tying, Sherman Act § 1*

Section One of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1 (1994). Against the backdrop of this general language, the courts have developed different doctrinal tests for different types of claims brought pursuant to § 1, including those challenging tying arrangements.

Tying is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product." *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir.1980) (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)).

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[10] Judge Walker dissented from the panel's opinion. He concluded that as a matter of law plaintiffs' allegation of "over-delegation," which led to a series of allegedly discriminatory individual decisions, could not satisfy Rule 23(a)'s commonality requirement. *See Caridad*, 191 F.3d at 296 (Walker, J., dissenting). He agreed with the majority, however, that the district court erred in crediting the defendant's expert; instead, the court should have "deferred" consideration of *both* reports until it considered the merits of the case. *Id.* at 296-97 (Walker, J., dissenting).

[11] Although I find it necessary to state the elements of the substantive claims and discuss them in relationship to the requirements of Rule 23, none of this discussion should be taken as my resolution of any merits question for purposes other than the pending motion.

A plaintiff must establish four elements to establish a defendant's liability for tying under a "*per se*" theory:

> (1) the alleged arrangement must affect a substantial amount of interstate commerce;
>
> (2) the two products . . . must be distinct;
>
> (3) the defendants must have actually tied the sale of the two products; and (4) the seller must have appreciable economic power in the tying market.

United States v. International Bus. Machs. Corp., 163 F.3d 737, 741 (2d Cir.1998) (internal citations and quotation marks omitted); *see also Northern Pac.*, 356 U.S. at 5, 78 S.Ct. 514 (explaining justification for *per se* illegality: "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

If the plaintiff fails to establish the elements of a *per se* claim (for example, by failing to demonstrate market power), it still may prevail under the "rule of reason" if it can demonstrate that the challenged arrangements are unreasonable "in light of their actual effects on the market and their pro-competitive justifications." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir.1997). Such an inquiry proceeds in three steps:

> First, the [p]laintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market . . . . Then, [i]f the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that

> the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.

Id. (internal citations and quotationmarks omitted; alterations in original).

b. *Attempt and Conspiracy to Monopolize, Sherman Act § 2*

Section Two of the Sherman Act provides in relevant part that

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. § 2 (1994). To win on an attempt to monopolize claim, a plaintiff must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). To win on a conspiracy to monopolize claim, a plaintiff must show "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." *International Distribution Ctrs., Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 795 (2d Cir.1987).

3. *The Injury in Fact Requirement: Amenability to Class Determination*

The defendants base their objection to class certification on Rule 23(a)(3)'s requirement that "the claims . . . of the representative parties [be] typical of the claims . . . of the class" and Rule 23(a)(4)'s requirement that "the representative parties will fairly and adequately protect the interests of

the class." [12] Additionally, they contend that Rule 23(b)(2) is inapplicable in a case such as this one, where damages are a prominent feature, and that the requirements of Rule 23(b)(3) are not met because individual questions will predominate over common ones.

The defendants' principal attack on the class certification motion rests on the rule that even an antitrust plaintiff who has successfully proven illegal conduct on the part of the defendant must also show that it was "injured in fact" by the illegality. According to the defendants, some members of the proposed class will not be able to show injury, and the injuries of the others will vary in ways not susceptible to resolution by a class-wide formula. Therefore, no plaintiff's claims will be "typical" of any others; there will be conflicts of interest within the proposed class; and individual issues of injury will predominate.

Section Four of the Clayton Act provides a cause of action, with treble damages, for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1994). Pursuant to this requirement, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 68 L.Ed.2d 442

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[12] The defendants do not dispute that the proposed class of meets the numerosity requirement of Rule 23(a)(1). Nor do they do challenge the adequacy of class counsel under Rule 23(a)(4). Although they do not explicitly dispute commonality under Rule 23(a)(2), commonality, typicality, and adequacy of representation (putting aside consideration of adequacy of counsel) "tend to merge" because they "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

(1981). This is true even if the elements of *per se* liability are established. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990); *see generally* II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 362c, at 216 (rev. ed.1995) ("No matter how clear the violation, the private plaintiff must still prove that he was actually injured in order to recover damages.")

Injury in fact is required even when an antitrust case is litigated as a class action. *See Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir.1978) (citing the Rules Enabling Act's dictate that a procedural rule cannot "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072; "Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs.") "Whether or not fact of damage can be proven on a common basis . . . depends upon the circumstances of each case." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir.1977). The *fact* of injury, which is required as an element of the plaintiff's claim, should not be confused with the *extent* of injury (as reflected by the amount of damages), which may not be amenable to establishment with great precision. *See Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.1982).

The defendants' first challenge to injury in fact responds to the scenario described in the plaintiffs' complaint, *i.e.*, absent the tie, virtually all members of the putative class would have refused the off-line debit cards and processed the same transactions using cash, checks, on-line debit, or other payment forms. Under this theory, defendants contend, there could be no class-wide injury in fact because (1) even some named plaintiffs have testified that they would have continued to accept off-line debit cards at current prices even absent the tie; (2) some merchants have PIN pads, while others do not (for widely varying reasons), resulting in variation in their ability to process transactions on-line; (3)

transactions formerly processed through off-line debit would be replaced by other payment forms, whose mix and costs would vary merchant-by-merchant; and (4) the expense of those payment forms, when considered together with the incremental sales produced by accepting off-line debit and the merchant's profit margin on those incremental sales, will determine whether a given merchant suffered any injury from the tie.

Although these arguments fully respond to the allegations in the complaint, they pass in the night with the plaintiffs' current theory of the case, as espoused by Carlton. That theory takes the complaint's scenario one step further. It posits that in the "but-for," untied world, after large numbers of merchants refused off-line debit cards, Visa and MasterCard would have cut their interchange fees in order to preserve universal acceptance. That move, in turn, would have led merchants to accept the cards once again. Carlton's scenario is a complete answer to the defendants' attack on the theory of the complaint; it posits class-wide injury resulting from every single class member's overpaying for off-line debit cards as a direct result of the tie. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir.1968) ("[D]efendants have argued that . . . other class members may be satisfied with the present price policy. Nonetheless, all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive." (internal footnote omitted)), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Carlton's theory does not require analysis of any of the individual questions listed above.

Defendants of course do not stop there; they contend that Carlton's theory does not support a finding of class-wide injury. First, they contend that his theory of a price decline in the tied product is too speculative. However, they themselves admit that "Dr. Carlton's 'price' theory of injury is not

unknown, and defendants do not here contend that no plaintiff could ever recover under a 'price' theory." (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Defendants' Memorandum"), at 29.); *see also* X Phillip E. Areeda et al., *Antitrust Law* ¶ 1769c, at 432 (1996) ("While uncommon . . ., such injury-in-fact for buyers is not impossible."). The difficulty of proof on a question such as this will not defeat class certification. *See Caridad v. Metro-North Commuter RR*, 191 F.3d 283, 291 (2d Cir.1999) (requiring class certification based on a theory "likely to be extremely difficult" to prove), *petition for cert. filed*, (U.S. Dec. 27, 1999) (No. 99-1084).

Second, the defendants contend that "[a]s a matter of elementary economic theory," a defendant that has market power in the tying product and overcharges on the tied product will do two things if the tie is broken: decrease the price of the tied product and *increase* the price of the tying product. (Defendants' Memorandum at 31-32.) If one assumes that credit card interchange fees would have been higher in the "but-for," untied world and that this fact is relevant for purposes of assessing injury in a tying case, then the fact of injury would no longer be susceptible to class-wide proof. Specifically, merchants with relatively high amounts of credit card transactions vis a vis debit card transactions (*e.g.*, jewelry stores) would have suffered little or no injury from the tie; indeed, they would have *benefitted* from it to the extent it kept credit card interchange fees down.

The defendants find support for their argument in a number of cases concluding that a tying plaintiff is injured only if it overpaid for the *package* of the tied and tying product. *See Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir.1985) ("[U]nless the plaintiff shows that the package price was elevated the suit must be dismissed without further ado."); *Kypta*, 671 F.2d at 1285 ("[I]njury resulting from a tie-in must be shown by establishing that payments for both

the tied and tying products exceeded their combined fair market value. The rationale behind this requirement is apparent: A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the [defendant] for the tying product."); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir.1971) (vacating a damages award based only on overcharge for tied product; "To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained."); *L. Knife & Son, Inc. v. Banfi Prods. Corp.*, 118 F.R.D. 269, 271 (D.Mass.1987).

The plaintiffs respond to this argument in several ways. First, they cite to a competing line of cases that support the proposition that purchasers challenging a tie are injured by paying an inflated price for the tied product (without any reference to the price of the tying product).[13] *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1054 (5th Cir.1982) ("In a tying arrangement, the ordinary measure of damages would be the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market."); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir.1981) (same); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976) (same); *Esposito v. Mister Softee, Inc.*, No. 75-CV-555, 1983 WL

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[13] The plaintiffs contend that this is the rule in the Second Circuit, but they cite only this tepid language from a 1953 case: "But if the Sherman Act was violated, the actual damages flowing from that violation may well have included the additional amount which the plaintiffs had to pay because of the tie-in purchases they were compelled to make." *Bascom Launder Corp. v. Telecoin Corp.*, 204 F.2d 331, 334 (2d Cir.1953). This language is equivocal, and it was dictum. I therefore do not consider it to have decided this question.

1806, at *2 (E.D.N.Y. Apr. 11, 1983) (same). *But see* X Areeda et al., *supra,* ¶ 1769c, at 430 (calling these cases "quite wrong").

Second, plaintiffs' counsel contended at oral argument that the cases cited by defendants all involved "fixed proportion" ties (*e.g.,* hot dogs and hot dog buns) and are therefore inapplicable to a case such as this one involving a "variable proportion" tie in which there is no necessary correlation in consumption of the two products. Counsel's attempt at distinguishing this entire line of cases fails, however, since several did not involve fixed proportion ties. *See Will*, 776 F.2d at 669 (tying product: franchise; tied product: data processing services); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 (11th Cir.1984) (tying product: franchise; tied product: equipment and vending services); *Siegel*, 448 F.2d at 46 (tying product: franchise; tied product: cooking equipment, food items, and packaging); *see also* X Areeda, *supra*, ¶ 1769c, at 431 ("Even when the products are not used exactly in fixed proportions, tied-product premiums are often offset by tying-product discounts below the price that would have prevailed without tying.").

Finally, plaintiffs contend that under the particular circumstances of the market at issue in this case, credit card interchange fees would not have increased in the "but-for," untied world. They rely principally on Carlton's reply declaration. As summarized above (*see supra* § 1.F(3)) Carlton relied on both empirical evidence and economic theory to refute the defendants' claims. He pointed out that in Canada, where banks do not issue off-line debit cards (and thus there is effectively no tie) credit card interchange fees are *lower* than in the United States. (Carlton Reply ¶¶ 27-30.) In addition, Carlton pointed out that the dramatic increase in off-line debit transactions between 1991 and 1998 did not result in a corresponding decline in credit card interchange fees, as defendants' theory (all else being equal) would have

predicted. Indeed, those fees generally stayed the same or increased (when adjusted for inflation). (*Id.* ¶ 31.) As for economic theory, Carlton contended, as plaintiffs' counsel did at oral argument, that defendants' proffered model was limited to situations in which the tying and tied products are sold in fixed proportions, and that models applicable in other settings predict either no increase in the price of the tying product when the tie is broken, or, in one model, a decline in price for *both* products when the tie is broken. (*Id.* ¶ 35.)

The plaintiffs also seek to undermine Schmalensee's argument with his own testimony. Specifically, Schmalensee stated at his deposition that "while I think it is likely" that credit card interchange fees would have risen, "I haven't pushed it far enough to have an opinion." (Deposition of Richard Lee Schmalensee at 128, attached as Exhibit 1 to Reply Declaration of Lloyd Constantine.)

Finally, at oral argument, plaintiffs' counsel suggested that, as part of plaintiffs' proof on its § 2 attempt to monopolize claim, they would demonstrate that the defendants attempted to monopolize the debit card market partly for the purpose of keeping credit card interchange fees high.[14] If that attempt were thwarted by breaking the tie, he continued, credit card interchange fees would actually decline.

I conclude that the plaintiffs have met their burden under *Caridad* of showing that injury in fact is susceptible to common proof and that class treatment is therefore appropriate. They have offered both empirical and theoretical support for their claim. Specifically, for present purposes,

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[14] In this regard, plaintiffs point to an internal Visa document from 1990 that termed Visa expansion into the on-line debit market a "[b]usiness [n]ecessity" because development of a "mature" regional on-line debit "alternative" could cost Visa members $813 million due to "downward pressure" on credit card interchange. (Memo from Ron Hodges, Visa Debit Market Development, November 29, 1990, Bates Stamp 0024939.)

taking into account that a "weighing of the evidence is not appropriate at this stage in the litigation," *Caridad*, 191 F.3d at 293, plaintiffs have established to my satisfaction that, in the "but for," untied world, defendants would have been compelled to lower their interchange fees for off-line debit cards and would not have raised the credit card interchange fees.

Plaintiffs have therefore made a sufficient showing that the package price, encompassing both credit and debit interchange fees, would decline absent the tie.[15] Professor Areeda has noted that, although proof of such a theory is "elusive and seldom attempted," antitrust plaintiffs "are clearly entitled to damages when the sum of tying and tied product prices would have been lower . . . absent the tie." X Areeda et al., *supra*, ¶ 1769b, at 429. There is nothing inconsistent between this assertion and class certification in this case; class certification is required even when the proffered common theory of injury is "likely to be extremely difficult to prove." *Caridad*, 191 F.3d at 291; *see also Krueger v. New York Tel. Co.*, 163 F.R.D. 433, 442 (S.D.N.Y.1995) ("The plaintiffs have laid a sufficient evidentiary foundation which, if believed, supports their allegations of common questions of law and fact."); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1781, at 7-8 (2d ed.1986) ("[I]f plaintiffs' assertion of class status is at least colorable, the court should allow the action to proceed under Rule 23 and move the case forward to an adjudication on the merits.").

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[15] I thus need not choose between the competing line of cases described above: for plaintiffs have proffered a sufficient theory of class-wide injury under either the "package" or the "tied product" measure of injury.

4. *The Defendants' Remaining Injury/Causation Contentions*

The defendants' remaining contentions can be disposed of more expeditiously. First, they contend that in Carlton's "but-for," untied world (which assumes defendants' market power), defendants would not lower off-line debit interchange fees across the board, but would instead selectively reduce fees as necessary to keep individual merchants or groups of merchants on board. Yet neither defendant has ever engaged in merchant-specific pricing for any of its products, and it would be speculative to suppose that they would in the "but-for," untied world. The defendants do have broad pricing categories for different merchant classes; Carlton's damages methodology could easily be adjusted to account for that fact if necessary.

Next, defendants contend that Carlton's theory fails to account for what they predict would be a decline in the volume of off-line debit transactions in the "but-for," untied world with lower off-line debit interchange fees. That decline, considered in conjunction with defendants' assertion that some merchants garner incremental sales from accepting the cards, would create "winners" and "losers" and render class-wide assessment of injury inappropriate. This argument is immaterial when an antitrust plaintiff proceeds on an "overcharge theory" of damages.[16] *See New York v. Hendrickson Bros.*, 840 F.2d 1065, 1079 (2d Cir.1988) ("[A]ntitrust treble-damage actions should not be complicated

[16] In addition, plaintiffs argue that, for several reasons, transaction volume would not decline in the "but-for," untied world. After Visa dramatically cut the interchange fee for Interlink, its on-line debit card, transaction volume increased. Moreover, lower off-line debit fees would reduce merchants' incentive to "steer" customers (*i.e.*, encourage them to use other payment forms), thus increasing transaction volume. Some of the banks' lost interchange revenue might be recovered in the form of cardholder fees.

by a need to trace the effects of the overcharge with respect to such matters as prices, costs, and the potentially different behavior of all the pertinent variables in the absence of the overcharges."). The defendants dispute the applicability of horizontal price-fixing cases such as *Hendrickson Brothers* to a tying case such as this one, but I have already concluded that the plaintiffs have made a sufficient showing to go forward with an overcharge theory on a class-wide basis. Therefore, *Hendrickson Brothers* is applicable for present purposes.

Defendants contend that causation may not be proven on a class-wide basis. *See Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir.1986) ("[L]ack of causation in fact is fatal to the merits of any antitrust claim. Consequently, an essential element in plaintiffs' claim is that the injuries alleged would not have occurred *but for* [defendant's] antitrust violation." (internal citation omitted)). Specifically, defendants contend that any merchant that does not like off-line debit cards is capable of "steering" its customers to other forms of payment. Any merchant that chooses not to steer (and the record indicates there are many) cannot claim that any injury it suffers from off-line debit interchange fees is caused by the tie; instead, it is caused by the decision not to steer.

I will assume for present purposes that defendants have correctly applied the causation requirement to the facts of this case; their objection to class certification on this basis still fails. Defendants contend that their policies allow merchants to attempt to "steer" off-line debit card holders to other forms of payment, or to prompt them to enter their PIN and therefore convert the sale into an on-line transaction. They also acknowledge, however, that if a customer refuses to be "steered" or "prompted," the merchant must allow him to complete the transaction with his off-line debit card. That is the essence of defendants' "honor all cards" rule. A merchant

that steers will not succeed in every single transaction; there will always be an irreducible minimum of customers who will use their off-line debit cards.[17] Therefore, even hypothetical Merchant A with the most aggressive steering program permissible under its contract would suffer some injury caused by the fact that it is forced to accept the unwanted off-line debit card.[18] Likewise, Merchant B, which engages in no steering, would suffer injury caused by the tie even under the defendants' strict theory of injury and causation; if it implemented a steering program, it would end up in the same situation as Merchant A.

The *presence* of injury and causation is binary; it is either there or it is not. According to Carlton's theory, injury and causation is present for every putative class member. The *extent* of injury is another question. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) ("[Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."). It may be that defendants' argument about steering will have force if repackaged as one addressing mitigation of damages. However, the presence of individualized defenses, such as

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[17] Consumer surveys submitted by defendants show that a sizeable minority of cardholders prefer off-line to on-line debit. (Declaration of Mark Kirsch, Exhibits 98-99.)

[18] For purposes of the present motion, I reject defendants' contention that there is no causation when this irreducible minimum of hard-core off-line debit card users refuses to be steered. According to this argument, the customer's refusal, not the tying arrangement, is the cause in fact of any injury. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.").

mitigation, going only to damages are generally regarded as no barrier to class certification. *See In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 95 (S.D.N.Y.1998) ("'It is well established that individual questions with respect to damages will not defeat class certification or render a proposed representative inadequate unless that issue creates a conflict which goes to the heart of the lawsuit.'")(quoting *In re AM Int'l, Inc. Securities Litig.*, 108 F.R.D. 190, 196 (S.D.N.Y.1985)); *see also Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566 (2d Cir.1968) ("All of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action."), *vacated on other grounds*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Krueger*, 163 F.R.D. at 441 ("To the extent that there may be specific defenses against specific members of the class, they would not justify denying class action certification."); *Uniondale Beer Co., Inc. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 344 (E.D.N.Y.1987); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *supra*, § 1781, at 8-9 ("[I]t uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.").[19]

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[19] Most of the cases simply state the rule that individual damages questions will not bar class certification in conclusory fashion without assessing whether individual questions would predominate if each damages action had to be tried separately. But that is not always the case. In *Abrams v. Interco, Inc.*, 719 F.2d 23 (1983), the Second Circuit quoted favorably this passage from Professor Areeda:

> The damage issue turns out to be a major stumbling block for [antitrust] class actions. The evidence establishing damages usually varies from class member to class member. . . . Even the necessity of individual trials on damages may be fatal if the class numbers in the thousands or millions. Individual litigations in such cases would

5. *Class Treatment of the Substantive Elements of the Claims*

In addition to their substantial arguments regarding injury, the defendants tack on several half-hearted contentions that some of the substantive elements of plaintiffs' claims are not susceptible to class-wide treatment. Those contentions are meritless.

a. *Whether Credit and Debit Cards Are Separate Products*

In a citation-free portion of their brief, defendants argue that putative class members may differ on the question of whether, from their individual, subjective perspectives, credit and debit cards are separate products, and that this question is therefore unsuitable for resolution on a class-wide basis.

"The courts uniformly consider the issue whether the tying arrangement consists of separate tying and tied products to be common to all members of the class." Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 Vand. L.Rev. 213, 220 (1983); *accord* John H. Matheson, *Class Action Tying Cases: A Framework for Certification Decisions*, 76 Nw. U.L.Rev. 855, 861 (1982) ("The court's determination whether the defendant offered two products will affect all prospective members of a class in a common manner.") The Supreme Court has held that "the answer to the question of whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19, 104 S.Ct. 1551, 80

---

be clearly infeasible, but the courts will not permit class actions unless they can devise a practical means for their litigation.

Id. at 31 (quoting 2 Areeda & Turner, *Antitrust Law* § 332c, at 157 (1978)). It may well be appropriate to address before trial the merits of some of defendants' damages-related arguments, and whether, upon resolution of those issues, there remains a "practical means" to litigate the damage claims of class members. *See infra* § II. B(7).

L.Ed.2d 2 (1984). The operative question is whether "two separate product markets have been linked." *Id.* at 21, 104 S.Ct. 1551. This is a question easily decided on an aggregate basis.

b. *Whether the Defendants Possess Market Power in the Tying Product*

The defendants also contend that the existence of their market power will depend on the size of the putative class member, thus making class-wide resolution of this element unwarranted. I reject this contention.

Market power is "the ability of a single seller to raise price and restrict output." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (quoting *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969)). "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." *Id.* Because this inquiry focuses on the position of the seller, not that of individual buyers, it "is readily susceptible to proof in a class action." *Hill v. A-T-O, Inc.*, 80 F.R.D. 68, 69 (E.D.N.Y.1978). One commentator has cautioned that class treatment of market power is appropriate only when plaintiffs rely on "objective evidence of either the defendant's market dominance or the product's uniqueness," as opposed to "the attitude of the purchaser or . . . the conduct of particular business relationships." Matheson, *supra,* at 881-82. According to the Carlton Declaration, the plaintiffs here will rely on objective evidence of market share and price discrimination (by category, not by individual merchant) to prove market power.[20] (Carlton Declaration ¶¶ 15-23.) Class-wide determination of defendants' market power is warranted.

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[20] The defendants indicate that they will dispute Carlton's definition of the relevant market. Resolution of this definitional question is susceptible to class-wide resolution.

c. *Whether There Was Coercion*

The defendants contend that question of "actual coercion" is not susceptible to class-wide proof because, for example, some members of the putative class would opt to take Visa and MasterCard off-line debit cards even absent the tie. However, in cases such as this one, in which the alleged tie is the product of an undisputed contractual provision, the "requisite coercion" is established. *See Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir.1976); *see also* Hovenkamp, *supra*, at 221 ("[C]ircuits hold uniformly that if all members of a putative class can produce a written contractual provision requiring them to take the tied product, then the court will assume that the seller actually forced the arrangement upon them. Class certification then will be prima facie appropriate on this issue."). Defendants respond that *Hill* is inapposite because in that case customers were forced to buy an unwanted product, whereas here plaintiffs are not forced to buy anything: each use of an off-line debit card is the product of a decision by a consumer. This argument may or may not be relevant to the questions of what the contractual provision means or whether the disputed arrangement is a tie at all or whether injury in fact can be established. But it does not serve to distinguish *Hill* on the issue of coercion.[21]

d. *The Attempt and Conspiracy to Monopolize Claims*

The defendants devote a mere six lines in their sixty-page brief to their contention that class treatment is not appropriate for the § 2 attempt and conspiracy claims. Their argument is the same as their principal argument against the tying claim, namely, that the fact of injury is not susceptible to common proof. I addressed that argument above. The defendants do not challenge the appropriateness of class treatment of the

[21] The defendants do not challenge the propriety of class certification as to the remaining element of the § 1 claim, namely whether a substantial share of interstate commerce was affected by the disputed arrangement.

actual elements of these claims, all of which focus on the defendants' conduct and its effects on the relevant markets, factors that will not vary from plaintiff to plaintiff.

For the foregoing reasons, I conclude that plaintiffs have carried their burden of establishing the prerequisites of a class action under Rule 23(a). For substantially the same reasons, I find that the plaintiffs have carried their burden under Rule 23(b)(3) by establishing that the common questions of law and fact identified predominate over any individual questions and that a class action is superior to any other means of adjudication. Without class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct.

6. *Rule 23(b)(2)*

I also conclude that the action may be maintained under Rule 23(b)(2), which states that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The notes to the rule list a suit "to test the legality of [a] 'tying' condition" as among the types of cases suitable for maintenance under Rule 23(b)(2). *Id.* advisory committee's note. The "honor all cards" rule is "generally applicable" to all members of the class, and the request for an injunction ending it is central to the plaintiffs' suit.

To be sure, the plaintiffs seek a large damages award as well, but the presence of a damages claim will not defeat maintenance of a class action under Rule 23(b)(2) when "the requested . . . injunctive relief is a significant component of the overall relief which plaintiffs seek." *In re Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517

(S.D.N.Y.1996). Because the highly significant injunctive relief sought here is as important as the damages claimed, the cases cited by defendants, such as *Kaczmarek v. International Business Machines Corp.*, 186 F.R.D. 307 (S.D.N.Y.1999), are inapposite. In *Kaczmarek* the court held that 23(b)(2) was unavailable because plaintiffs sought an injunction only "[a]s an aside" in a case in which equitable relief was not even available. *Id.* at 313. Here, the preliminary damages estimate is approximately $8 billion. By the same methodology, the requested injunction would save the putative class $63 billion over the next decade. The requested injunction is clearly not window dressing.

Having found certification appropriate under both Rule 23(b)(2) and (3), I recognize that "major problems can arise" because the procedural consequences vary under the subsections. *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 n. 14 (2d Cir.1978). My inclination at this point is to provide general notice to the class, but to provide opt-out rights only as to the damages action. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1775, at 470 (2d ed.1986) ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. Indeed, quite commonly they will fall within . . . Rule 23(b)(3) and may be heard on a class basis under [that] subdivision."). The defendants have indicated that they plan to seek appellate review of an adverse decision on class certification, and no notice would issue during the pendency of any such review in the court of appeals. Thus, there will be ample opportunity to solicit the parties' views on the question.

7. *Rule 23(c)(1)*

Rule 23(c)(1) states that an order deeming a class action maintainable "may be altered or amended before the decision on the merits." I am "required to reassess [my] class rulings as the case develops." *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir.1999) (quoting *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir.1998), *cert. denied*, 526 U.S. 1114, 119 S.Ct. 1760, 143 L.Ed.2d 791 (1999)); *accord Parkinson v. April Indus., Inc.*, 520 F.2d 650, 653 (2d Cir.1975) ("The initial order is strictly provisional . . . ."). If factual or legal underpinnings of the plaintiffs' successful class certification motion are undermined once they are tested under a more stringent standard than *Caridad* allows, a modification of the order, or perhaps decertification, might then be appropriate. The same would be true if it appears that individual damages issues will come to overwhelm common questions in a class maintained under Rule 23(b)(3). *See* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *supra*, § 1781, at 8-9 ("[T]he question of damages can be severed from that of liability and tried on an individual basis.").

8. *Appeal*

Rule 23(f), which became effective on December 1, 1998, provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order." Fed.R.Civ.P. 23(f). According to the note following this provision, the rule's drafters contemplated that the decision whether to accept such an appeal is within "the sole discretion" of the court of appeals and can be analogized to the Supreme Court's certiorari power. *Id.* advisory committee's note. The committee note also states that "[t]he district court, having

worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal." *Id.*

To the extent my advice is useful to the Second Circuit, I recommend that it take an interlocutory appeal of the class certification order. This litigation poses enormous financial risks for the defendants, risks that are obviously increased drastically by certification of the class. Moreover, this certification motion raises substantial and novel questions involving the standards a district court should apply in evaluating a class motion and the interaction of those standards with antitrust principles.

CONCLUSION

I certify a class of all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept VisaCheck and/or MasterMoney debit cards under the challenged tying arrangements during the fullest period permitted by the applicable statute of limitations.[22] The Class does not include the named Defendants, their directors, officers or members of their families. Plaintiffs' counsel are appointed class counsel.

So Ordered.

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[22] The parties have not briefed the statute of limitations aspect of class definition.

APPENDIX C

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Sixth day of June, two thousand.

[Filed JUN 6, 2000]

Before: Hon. Thomas J. Meskill,
Hon. John M. Walker, Jr.,
Circuit Judges,
Hon. Charles H. Haden, II,*
District Judge

Dkt No: 00-8011

In re: VISA CHECK/MASTERMONEY ANTITRUST LITIGATION

A petition, pursuant to Fed. R. Civ. P. 23(f), for permission to appeal the district court order granting class certification having been filed by defendants, Visa U.S.A. and MasterCard International,

Upon consideration thereof, IT IS ORDERED that the petition be, and hereby is GRANTED.

---

* The Hon. Charles H. Haden, judge of the United States District Court for the District of West Virginia, sitting by designation.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meader
Beth J. Meader, Administrative Attorney

A TRUE COPY
Roseann B. MacKechnie, Clerk

By: /s/ [Illegible]
Deputy Clerk

ISSUED AS MANDATE:
June 6, 2000 [Illegible]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York 10007

[Filed Dec 4, 2001]

Robeann B. Mackechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 4th day of December two thousand one.

In re: Visa Check/Mastermoney

Dkt No: 00-7699

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants VISA U.S.A., Inc. and MASTERCARD International Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
ARTHUR M. HELLER
Administrative Attorney

(2)

Supreme Court, U.S.
FILED
APR 22 2002
OFFICE OF THE CLERK

No. 01-1464

In The
Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,

-Petitioners,

v.

WAL-MART STORES, INC., THE LIMITED, INC., SEARS, ROEBUCK AND CO., SAFEWAY INC., CIRCUIT CITY STORES, INC., NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, AND INTERNATIONAL MASS RETAIL ASSOCIATION, ETC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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38pp

QUESTIONS PRESENTED

1. Should the Court overrule *Eisen's* proscription of a preliminary trial on the merits, as defendants in effect seek, where the district court's rigorous and meticulous decision demonstrates, and the Second Circuit found, that the district court conducted an "exhaustive analysis . . . , carefully applying the Rule 23 requirements for class certification"?

2. Is a district court precluded from granting class certification solely because the damages portion of the trial may pose manageability problems if defendants assert a mitigation argument when (i) the argument was not raised in opposition to the class motion, (ii) the court nevertheless considered how it would address any individualized issues that might potentially emanate from such an argument, and (iii) both the viability of the argument and the majority of issues relating to it can be decided with common proof?

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

Bernie's Army-Navy Store
Auto-Lab of Farmington Hills
Burlington Coat Factory Warehouse Corporation
Sportstop, Inc.
Payless ShoeSource, Inc.
Shoes, Etc., Inc. (d/b/a Arnold's Shoes)
The Coffee Stop, Inc. (d/b/a Torreo Coffee & Tea Company)
UCC Kwik Doc, Inc. (f/k/a UCC Express, Inc.)
Computer Supplies Unlimited
Denture Specialists, Inc.
Geneva White, D.M.D.
Scrub Shop, Inc.

and all similarly situated persons.

No respondent has a parent corporation; and no publicly held company owns ten percent or more of any named respondent's stock.

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INTRODUCTION

On February 22, 2000, the district court certified a class of four million merchants who accept Visa and/or MasterCard credit card transactions and therefore are forced to accept Visa and/or MasterCard debit card transactions. The district court found, and the Second Circuit confirmed, that "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." App. 31a, 95a.

The motion to certify the class was brought by class representatives, who are the largest merchants in the United States (Wal-Mart, Sears, Circuit City, The Limited and Safeway), among the smallest (Bernie's Army-Navy, Scrub Shop and The Coffee Stop), and three merchant trade associations with more than one million merchant outlets large and small. The class was certified three weeks prior to the completion of discovery encompassing more than 350 depositions and four million pages of documents, after the court had set firm dates for argument of all dispositive motions (August 4, 2000) and trial (November 27, 2000),[1] and after the parties had filed the initial reports of their trial experts.

In affirming the district court, the Second Circuit stressed the "powerful policy considerations that favor certification" and "the exhaustive analysis performed by the district court, carefully applying the Rule 23 requirements for class certification," and concluded that

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[1] The court subsequently stayed the dates for the argument of the fully briefed dispositive motions and for trial, pending the determination of defendants' Rule 23(f) appeal and petition for certiorari.

"[g]iven the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited." App. 31a. These and additional court findings "that a class action is superior to any other means of adjudication" (App. 95a), and that all of the prerequisites of Rule 23 had been established, were the result of an extraordinarily rigorous analysis of all of the legal and factual issues relevant to the district court's Rule 23 determination.

The fact that the class was certified so close to the case's conclusion gave the district court the opportunity to delve deeply into the merits of plaintiffs' antitrust claims. The court engaged in a detailed analysis of numerous merits issues, including the elements of plaintiffs' tying and attempt-to-monopolize claims, the appropriate measure of damages in a tying case, and plaintiffs' demonstration of antitrust injury.

The district court's exhaustive examination of merits issues (at the close of discovery and near the time of trial) rebuts defendants' first contrived justification for certiorari – that the district court and Second Circuit failed to perform a rigorous Rule 23 analysis by not applying the proper standards for evaluating class certification evidence. This case does not present any conflict among the circuits on this issue. Defendants' use of this case to contrive a conflict thinly masks their attempt to overturn *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and require a preliminary merits determination as part of a Rule 23 inquiry.

The rejection by the district court and Second Circuit of defendants' "injury-in-fact" challenge was so rigorous that both courts discussed the potential manageability ramifications of a mitigation argument that defendants did not even raise in opposing the class motion. This

searching and preemptive examination only added to the detailed manageability inquiry undertaken by both courts. Both courts' meticulous manageability analyses rebut defendants' second contrived justification for certiorari. Their analyses of the Rule 23 requirements and overlapping merits/class issues were so rigorous that they went to the very limits of permissible inquiries without becoming the preliminary trial proscribed in *Eisen*.

The case described in the dissent bears no relation to this case. The dissent describes a case involving weak and unmanageable claims bearing a $100 billion price tag. The dissent further describes a case where class counsel inadequately represent and manipulate class representative pawns with nominal claims in order to coerce defendants into an expensive settlement. Using these inventions, the dissent identifies two inapposite concerns: manageability and adequacy of representation based on the appropriate measure of tying damages. As to manageability, the dissent ignores the searching inquiry performed by both lower courts. As to adequacy of representation, "an issue not raised by the parties" (App. 25a), the dissent ignores both courts' findings that plaintiffs' damages methodology satisfied either measure of damages.

The real case, reflected in the record, "is precisely the type of situation for which the class action device is suited." App. 31a. The real case is one that was ready for trial, and would have been tried in the year 2000 but for defendants' so far successful avoidance of the trial plaintiffs seek, through multiple meritless appeals of the class determination. The real case does not present the fanciful $100 billion claim that defendants and the dissent invent

but a much more modest (though still very large) claim reflected in the record and court files.[2] Of course, this figure will draw closer to defendants' exaggerated sum if the case is further delayed.

STATEMENT OF THE CASE

1. Factual Background

Plaintiffs refer this Court to the district court decision for the relevant facts. App. 57a-67a. The court garnered these facts from the complaint and more than 3,000 pages of document discovery, deposition transcripts, expert reports, affidavits, and other documentation submitted on the class motion. The record was culled from discovery comprising more than 350 depositions and more than four million pages of documents.

2. Plaintiffs' Class Certification Motion

The basis of the motion was that each class member is identically subject to defendants' "Honor All Cards" tying rules. These tying arrangements contractually require all merchants who accept defendants' credit transactions to also accept their debit transactions at supra-competitive prices. Despite defendants' suggestion to the contrary (Pet.

[2] Neither defendants nor the dissent cite the record for support of their invented $100 billion figure. In the record is the district court's reference to a preliminary damages estimate of $8 billion. App. 96a. In concocting the $100 billion figure for its apparent shock value, defendants may have trebled the $8 billion and added the $63 billion prospective value the court placed on the requested injunction for the decade following the class determination. *Id.*

6), no other payment networks "impose similar requirements" that tie debit cards to credit cards. Plaintiffs also moved for certification on their equally important Sherman Act Section 2 attempt to monopolize claim. In opposition to the motion, defendants principally challenged the sufficiency of the expert reports of plaintiffs' economist, Dr. Dennis Carlton. Defendants relied on the expert report of economist Dr. Richard Schmalensee for their attack on Carlton. As the district court noted, defendants virtually ignored plaintiffs' Section 2 claim. App. 94a-95a.

3. The Expert Reports

a. Plaintiffs' Expert, Dr. Carlton

Carlton concluded that the elements of plaintiffs' tying and attempt to monopolize claims could be established by common evidence and are appropriate for class-wide determination. The district court found that defendants' attack on Carlton in this regard was "half-hearted" and "meritless." App. 92a.

Carlton also concluded that the fact and measure of every class member's injury were appropriate for class-wide determination. As the district court noted, Carlton demonstrated that in the absence of defendants' trade restraints:

- A large number of merchants would have refused to accept defendants' off-line debit cards because of their supra-competitive interchange fees (App. 63a, 86a-87a);
- Defendants would have lowered their debit card pricing to the level of on-line debit pricing to maintain merchant acceptance of their off-line debit cards (App. 63a-64a, 86a-87a); and

- Each merchant's damages could be calculated with a common formula by measuring the overcharge it had paid on all of the off-line debit transactions it accepted. *Id.*

In reaching his conclusions, Carlton relied on, among other things, Visa's 1997 decision to reduce the interchange fee for its untied, on-line debit product, Interlink. App. 66a; Joint Appendix on Appeal to the Second Circuit ("JA") 440, 2994-95. Visa lowered the fee in direct response to the refusal by class representative Wal-Mart and other merchants to accept these debit transactions at the existing rates. JA 440, 2762-65.

In concluding that in the "but-for" world, defendants would have lowered their off-line debit pricing to levels comparable with on-line debit pricing, Carlton cited a MasterCard-sponsored analysis:

> If the retailers win the suit, and the tying arrangement is removed, then practically all retailers would abandon off-line debit under its present pricing structure. The card associations would be forced to rethink their interchange fees, and come up with a new pricing schedule that could compete with on-line debit . . . . [JA 2559]

The district court found that Carlton used relevant evidence to refute defendants' contention that such a reduction in off-line debit pricing would have resulted in fewer transactions:

- In 1997, Visa dramatically lowered its interchange fees for its Interlink on-line debit product. Carlton cited a Visa document showing that shortly after the price decrease, the number of Interlink transactions rose approximately 27 percent. App. 66a; JA 2995.
- Visa also lowered its off-line debit card interchange rates in 1992. Carlton cited evidence

> showing that the number of off-line debit transactions increased by almost 50 percent in the year after the price decrease, and by almost 1200 percent five years later. App. 66a; JA 2996.

The district court also noted that Carlton used two empirical benchmarks to refute defendants' theoretical contention that credit card interchange fees would have risen in the "but-for" world:

- In Canada, credit card interchange fees are lower than in the United States despite the fact that there effectively is no tie between defendants' credit cards and debit cards. App. 66a-67a.
- Despite a dramatic increase in off-line debit volume in the United States during the 1990s, credit card interchange fees did not decline as Schmalensee's model predicts. App. 67a.

b. Defendants' Expert, Dr. Schmalensee

In a 91-page report prepared during a total of approximately 30 hours that he worked on his entire assignment, including both the class motion and the merits of plaintiffs' ultimate claims (JA 2290 at 26-27, 2300 at 66, 2299 at 62), Schmalensee disputed Carlton's conclusions on class-wide injury and damages. Schmalensee's principal criticism was his belief, apparently arrived at quickly and with virtually no knowledge of or reference to the discovery record, that Carlton did not account for several effects which Schmalensee speculated might have occurred in the "but-for" world:[3]

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[3] Schmalensee testified that (i) he did not interview anyone at Visa or MasterCard (JA 2291 at 32, 2343 at 174); (ii) he did not review any MasterCard deposition transcripts, interrogatory responses or rules (JA 2291 at 31-33, 2298 at 60); and (iii) he did not even know that he was MasterCard's class expert (JA 2295 at 48) ("I

(Continued on following page.)

- There would have been fewer off-line debit transactions because fewer banks would have issued the cards, fewer merchants would have accepted them, and defendants would have spent less money promoting them (App. 64a);
- Defendants' credit card interchange fees would have increased (App. 64a-65a); and
- The existence and extent of each merchant's injuries would depend on a number of merchant-specific factors such as the merchant's mix of debit and credit card transactions. App. 65a.

At his deposition, Schmalensee recanted most of the purported certainty of his theoretical attack on Carlton's conclusions. When asked whether he agreed with Carlton's theory of injury and damages, Schmalensee acknowledged: "I simply haven't done enough study to have a firm view on what would have happened. I think that is a possible state of affairs, I don't think it's an inevitable state of affairs." JA 2316 at 133.

Schmalensee similarly retreated when pressed about the basis for his theory that off-line debit usage would have decreased in Carlton's "but-for" world: "I'm not making a strong argument here except to just say if all those things happen as I have argued, you could easily have reduced acceptance." JA 2392 at 369. As for his and defendants' core assertion that credit card interchange fees would have increased in the "but-for" world, Schmalensee testified that he had not "pushed it far enough to have an opinion" – as noted by both courts below. App. 15a, 86a. He also admitted that he did not even ask his clients whether credit card interchange fees would have risen. JA

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worked on [my opposition report] without any notion of what MasterCard might or might not do.").

2315 at 129 ("I haven't asked the question and no one has told me that.").[4]

Schmalensee testified that class treatment in a *per se* tying case was inappropriate because, he theorized, certain members of the class inevitably benefitted from the tying arrangement. However, Schmalensee admitted that he could support class certification in a price-fixing case, even though some class members had benefitted from the price-fixing and would have been harmed by its elimination. JA 2350-51 at 201-07. He further revealed the actual basis for his opposition to the class: **Q.** "So you disagree with the current Supreme Court rule on tying?" **A.** "Sadly, I do." JA 2350 at 201. Despite this bias and despite his retractions and admissions, defendants relied almost exclusively on Schmalensee's opinions in opposing the class motion and in moving to strike Carlton's reports under the doctrine of *Daubert* and *Kumho Tire*.

4. The District Court's Decision

On February 22, 2000, the district court certified plaintiffs' Section 1 and 2 claims for a class defined as "all persons and business entities who have accepted Visa and/or MasterCard credit cards and therefore have been required to accept VisaCheck and/or MasterMoney debit cards under the challenged tying arrangements. . . . " App. 98a. The district court also denied defendants' motion to

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[4] Schmalensee also admitted that he had never seen any evidence to support his speculation that debit transactions created incremental sales and had not asked anyone at Visa whether there was support for his position: "I didn't. For purposes of this analysis, it didn't seem particularly important." JA 2438 at 454. Despite these admissions, Schmalensee's report projected that debit transactions created a five percent incremental sales figure, which he later admitted he made up. JA 2437 at 450.

strike Carlton's expert reports. App. 72a. These decisions followed an exhaustive analysis of Carlton and Schmalensee's opinions, both individually and in light of each other.

The district court found that "defendants have fallen far short of showing that Carlton's opinion is the kind of 'junk science' that a *Daubert* inquiry at this preliminary stage ought to screen." *Id.* The court found that the basis of defendants' motion was simply their disagreement with Carlton, which "is not a basis for exclusion." App. 71a-72a.

In certifying the class, the district court demonstrated its command of and obedience to *Eisen*, stating that "'[i]n determining the propriety of a class action, the question is not whether the plaintiff . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" App. 74a (citing *Eisen*, 417 U.S. at 178). Accordingly, the court refused to countenance a "battle of the experts" to preliminarily determine the ultimate merits: "a district court is not permitted to indulge 'dueling' between opposing experts at the class certification stage." App. 74a (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of 'statistical dueling' is not relevant to the certification determination."), *cert. denied*, 529 U.S. 1107 (2000)).

Although the district court would not indulge a duel of the experts, the meticulous point-by-point analysis of Carlton and Schmalensee, which comprises more than one-third of the district court's lengthy opinion, is telling. In every instance, the district court noted that Carlton had provided record and/or empirical evidence which refuted Schmalensee's theoretical criticisms. *See, e.g.*, App. 65a-67a, 85a-88a. When this is coupled with Schmalensee's retractions and admissions (*supra* at 7-9), it is clear that

the district court declined to indulge a "duel" only in the sense that it did not reach the inevitable conclusion that Schmalensee's report was dead on the battlefield.[5]

After its rigorous analysis, the district court concluded that plaintiffs easily satisfied the requirements of Rule 23:

- Carlton's theory "is a complete answer to the defendants' attack on the theory of the complaint," and "does not require analysis of any of the individual questions" posed by defendants. App. 82a.
- "Carlton relied on both empirical evidence and economic theory to refute the defendants' claims." App. 85a.
- "Schmalensee stated at his deposition that 'while I think it is likely' that credit card interchange fees would have risen, 'I haven't pushed it far enough to have an opinion.'" App. 86a.
- "[P]laintiffs have proffered a sufficient theory of class-wide injury under either the 'package' or the 'tied product' measure of injury." App. 87a n.15.
- Defendants have never "engaged in merchant-specific pricing . . . [and while they] do have broad pricing categories for different merchant classes[,] Carlton's damages methodology could easily be adjusted to account for that fact if necessary." App. 88a.
- Defendants' argument that under Carlton's theory there would be "winners" and "losers" making class-wide assessment of injury inappropriate "is

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[5] This message was not lost on defendants, however, who withdrew Schmalensee when they filed the reports of their trial experts. Schmalensee, unlike Carlton, had originally been retained to analyze both the class issues and the ultimate merits of the case. JA 1636 at 8; 3340 at 26.

immaterial" under plaintiffs' "overcharge theory" of damages. App. 88a.

- "According to Carlton's theory, injury and causation is present for every putative class member." App. 90a.
- Defendants' "half-hearted contentions that some of the substantive elements of plaintiffs' claims are not susceptible to class-wide treatment . . . are meritless." App. 92a.

The district court also rejected defendants' argument that because plaintiffs could allegedly "steer" consumers away from paying with defendants' debit cards (although plaintiffs are contractually required to accept them), plaintiffs could not demonstrate common injury/causation. App. 89-90a. The Second Circuit and the dissent agreed with the district court's rejection of this steering/causation argument. App. 16a-17a, 41a n.3. The district court noted that the argument might be "repackaged as one addressing mitigation of damages." App. 90a.

Contrary to defendants' assertion that the district court "acknowledged that [defendants] had raised a substantial mitigation defense" (Pet. 9), the court merely advised defendants that their "steering" argument (framed as one addressing causation) was misplaced. The court nevertheless preemptively considered the potential manageability implications of the unasserted mitigation argument. The court held that if it becomes an issue, there are numerous tools which can be employed to deal with it. App. 90a-91a, 97a.

The district court concluded by stressing that, in addition to satisfying all the Rule 23 requirements, there were important policy considerations supporting certification: "Without class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining

damages for defendants' allegedly illegal conduct." App. 95a.

5. The Second Circuit's Affirmance

The Second Circuit affirmed, upholding the district court's distinction between a decision on Rule 23 and a preliminary decision on the ultimate merits. App. 11a-12a. The Second Circuit similarly upheld the district court's conclusion that this distinction precluded it from engaging in a merits-based "battle of the experts":

> [A] district court may not weigh conflicting expert evidence or engage in "statistical dueling" of experts. The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive. [App. 12a (citing *Caridad*, 191 F.3d at 292-93).]

After considering the district court's thorough analysis of the expert opinions, the Second Circuit rejected as "meritless" defendants' claim that the district court did not sufficiently examine Carlton's expert evidence. App. 12a. The court addressed the failure of each of defendants' challenges to the class decision, noting that many of them "appear merely to rehash their many [rejected] criticisms of Carlton's theory." App. 16a-17a.

In his dissent, Judge Jacobs identified two alleged errors in what he termed "the district court's otherwise thorough opinion." App. 35a. First, he erroneously concluded that the damages portion of the trial would be unmanageable because of an alleged need for individualized determinations. This was based on his speculation that (i) defendants would repackage their rejected steering/causation argument as a mitigation defense, (ii)

plaintiffs' pending dispositive motion to strike the steering defense would fail, and (iii) defendants would then sustain their burden of proving mitigation through steering. App. 37a-41a.

Second, Judge Jacobs argued that the district court improperly declined to decide the proper measure of damages in a tying case. He asserted that under the "package" measure, this case would present irreconcilable conflicts among class members that would render the class representation inadequate under Rule 23(a)(4). App. 43a-55a. This issue was not raised, briefed, nor argued in either court below. App. 25a. Central to his dissent was an underlying concern that class certification would force defendants into an unjust settlement.

The Second Circuit rejected each of Judge Jacobs' concerns. With respect to mitigation/manageability, the court "emphasize[d] that 'the issue of manageability of a proposed class action is always a matter of justifiable and serious concern for the trial court and peculiarly within its discretion.'" App. 23a (citation omitted). The Second Circuit also found that the "district court recognized that although it appeared at this preliminary stage that damages could be determined with the aid of a class-wide formula, . . . [it] adequately considered how it would address any individualized issues that might arise in the case . . . ." *Id.* The court further noted that the viability of defendants' mitigation defense was itself subject to common proof, as were "the majority of the issues relating to this defense . . . ." App. 18a, 20a-21a.

As to the proper measure of damages, the Second Circuit pointed to three crucial facts ignored by Judge Jacobs that undercut his assumption that credit card interchange fees would have risen in the "but-for" world. This assumption is a necessary condition for the "tied

product" versus "package" dispute to have any relevance. First, he ignored the district court's finding that plaintiffs "offered both empirical and theoretical support for their claim . . . that, in the 'but for,' untied world, defendants . . . would not have raised the credit card interchange fees." App. 86a-87a. This finding "rendered such a decision [on the appropriate measure of damages] unnecessary," because under either measure, all four million class members have suffered antitrust injury. App. 26a-27a, 87a n.15.

Second, Judge Jacobs ignored the fact, noted by both courts, that defendants' own expert had no opinion on whether defendants' credit card interchange rates would have risen in the "but-for" world. App. 15a, 86a. Third, he ignored evidence cited by the district court that defendants' anticompetitive conduct was intended "in part to keep credit card interchange fees high." App. 15a, 86a & n.14. Ignoring these crucial facts, Judge Jacobs criticized the courts for allegedly failing to consider the adequacy of class representation, an issue raised by none of the parties.

Despite these failings, the Second Circuit addressed Judge Jacobs' concern about irreconcilable conflicts. The panel concluded that even assuming the "package" measure of tying damages was proper, the concern was "overstate[d]" because of the common interest among all class members to prove that absent the tie, debit card fees would drop and credit card fees would not increase. App. 27a-29a.

The Second Circuit similarly dismissed as "largely inapposite" Judge Jacobs' concern that granting class certification would coerce defendants into settlement. App. 30a-31a. The panel held that while the potential for such a coercive effect may be a basis for granting a Rule 23(f)

appeal, it is not relevant to deciding the appeal: "Now that we have granted the appeal and found the district court's certification decision to be thorough, accurate, and not an abuse of discretion, the dissent's argument about coercion loses its force." App. 31a.

The Second Circuit emphasized the "powerful policy considerations that favor certification" and "the exhaustive analysis performed by the district court, carefully applying the Rule 23 requirements for class certification," and concluded that "[g]iven the strong commonality of the violation and the harm among the merchants, this is precisely the type of situation for which the class action device is suited." *Id.* The Second Circuit denied defendants' petition for rehearing and rehearing *en banc* without dissent. App. 101a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS REGARDING THE STANDARDS FOR EVALUATING EVIDENCE AT CLASS CERTIFICATION

A. Defendants' Question on the Proper Standards for Evaluating Evidence Has No Application to the Facts of this Case

The portion of defendants' question addressing the proper standard for evaluating evidence at class certification is based entirely on the contrivance that the district court did not perform a rigorous analysis of the evidence submitted by the parties. Pet. 14-15. Defendants have selected the wrong decision to question on this ground. The Second Circuit pointedly noted that the

district court performed an "exhaustive analysis . . . , carefully applying the Rule 23 requirements for class certification." App. 31a. Even a cursory review of the decision reveals the painstaking scrutiny the district court gave to the parties' expert reports. *See supra* 9-13.

The court did not merely find that plaintiffs' expert evidence was "colorable or admissible," as defendants claim. Pet. 3-4, 17-18. On the contrary, the court thoroughly evaluated each of the numerous theoretical criticisms defendants leveled at plaintiffs' injury and damages methodology and concluded that plaintiffs had rebutted all of them, in most cases with empirical evidence. The Second Circuit dismissed as "meritless" defendants' contention to the contrary: "The district court, in an almost fifty page opinion, thoroughly considered each of defendants' criticisms of Carlton's theory and Carlton's response to each of those criticisms and concluded in each case that Carlton's response sufficiently addressed the criticism." App. 12a.

The district court's rigorous analysis delved deeply into the merits and exhaustively evaluated the class evidence culled and submitted by the parties from the massive and virtually complete discovery record. There is nothing more the court could have done without making a preliminary determination on the ultimate merits.

B. This Case Does Not Conflict with Defendants' Cited Cases

Rather than clash, this case harmonizes with those cited by defendants to support their contrived conflict among the circuits. In *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002), the Seventh Circuit reversed a district court's decision to certify a class that was based on (i) an empty factual record, (ii) a theory that sharply

departed from both Supreme Court precedent and "normal understanding," and (iii) an unscrutinized expert report that lacked any empirical or theoretical support and was internally inconsistent. *Id.* at 937-40. The district court viewed the clash of reputable economists alone, without any analysis of their competing opinions, as sufficient to support class certification. *Id.* at 938.

The absence of analysis by the district court in *West* is a far cry from the rigor with which the district court examined the expert reports in this case. Notably, the court here engaged in some fifteen pages of point and counterpoint analysis of the Carlton and Schmalensee reports. The minimal support for certification offered in *West* contrasts dramatically with the richness of the record evidence, empirical benchmarks, theory, and case precedent supporting plaintiffs' class motion.

Defendants fare no better in contriving a conflict between this case and *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001). There, the Seventh Circuit remanded for further review the class decision because the district court refused to look beyond the complaint to consider the contested Rule 23 issues or the recognized problems with certifying the class. *Id.* at 674-76. The Seventh Circuit held that this refusal constituted a failure to exercise the court's discretion, noting that nothing in Rule 23 or *Eisen* "prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers." *Id.* at 677. Far from "abdicat[ing] its responsibility" under Rule 23 (Pet. 3), the district court in this case firmly exercised its discretion by performing an exhaustive Rule 23 analysis that went well beyond the complaint. The district court here did precisely

what the Seventh Circuit in *Szabo* and *West* held a district court is required to do.

Defendants' remaining cases also fail to demonstrate a conflict. These cases simply stand for the unremarkable proposition that in ruling on a class motion, a district court may need to look beyond the pleadings. *See Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 186 (3d Cir. 2001) ("The issue, then, is whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) ("'[I]t may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'") (citation omitted); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297 (1st Cir. 2000) (affirming certification where district court "engaged in a case-specific analysis that went well beyond the pleadings"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("A district court certainly may look past the pleadings . . . . ").

The "common thread" in defendants' cases (Pet. 18), is the principal that a district court must perform a rigorous analysis that may need to go beyond the pleadings in order to do so. The district court in this case obviously obeyed and went beyond this standard of rigor.

C. There Is No Conflict Among the Circuits Here

Not only have defendants failed to present a conflict between the cases they rely upon and this one, but they have also failed to find any case that identifies such a conflict. Defendants have further failed to find any case criticizing the decision to grant class certification in this

case. On the contrary, the district court's decision has been cited with approval by several courts outside of the Second Circuit because it correctly applied the standards for evaluating expert evidence applied by courts in all circuits.

In particular, courts in both the Third and Seventh Circuits – the alleged source of the contrived conflict – have explicitly approved the approach taken by the district court in this case. *See In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001) ("To the extent that this discussion involves a battle of experts, it [is] not appropriate for the Court to determine which expert is more credible at this time. . . . To preclude such evidence at the class certification stage, it must be shown that the 'opinion is the kind of "junk science" that a *Daubert* inquiry at this preliminary stage ought to screen.'") (citing *In re Visa Check*, 192 F.R.D. at 78) (App. 72a); *Bromine Antitrust Litig.*, 203 F.R.D. 403, 408 (S.D. Ind. 2001) (citing *Linerboard* for identical language). Since *Bromine* and *Linerboard* also cite *Szabo* and *Newton* as controlling on the relevant issue in their respective circuits (7th and 3rd), these courts recognize what is obvious – there is no conflict with the Second Circuit. This Court recently denied a petition for certiorari that alleged a virtually identical circuit conflict as that alleged here. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 120 S. Ct. 1349 (2002).

Courts in other circuits have similarly approved the district court's treatment of the expert evidence in this case. *See, e.g., In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 311 (E.D. Mich. 2001); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 470 (S.D. Ohio 2001); *Vickers v. General Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001). Numerous other cases have similarly refused to allow a "battle of the experts" at the class certification stage. *See,*

e.g., DeLoach v. Philip Morris Cos., Inc., No. CV1235, 2002 WL 559453, *13, 15 (M.D. N.C. Apr. 3, 2002); *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 324 n.16 (C.D. Cal. 1998); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486-87 (W.D. Pa. 1999); *In re Terazosin Hydrochloride Antitrust Litig.*, 203 F.R.D. 551, 556 n.6 (S.D. Fla. 2001); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995); *Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 424-25 (D. N.M. 1988); *Wilfong v. Rent-A-Center, Inc.*, No. CV-0680, 2001 WL 1795093, *3 n.5 (S.D. Ill. Dec. 27, 2001).

The contrived nature of defendants' current argument is strikingly revealed by the fact that defendants are now arguing directly against the positions they took below. Defendants acknowledged to both courts below that there can be no battle of the experts at the class stage.[6] Defendants also told the Second Circuit that they believed that *Caridad's* prohibition of expert duels was correct.[7] Moreover, defendants, not plaintiffs, told the district court that the proper standard for evaluating expert evidence

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[6] *See, e.g.*, JA 3193 ("It is absolutely clear you should not be weighing who is right and who is wrong when they disagree about something . . . . "); *Id.* ("I quite agree we cannot weigh the expert testimony . . . . "); JA 3194 ("I know we are not going to weigh [Carlton's] view against Professor Schmalensee on any details . . . . "); Def. 2nd Cir. Rep. Br. at 6 ("The district court is, of course, foreclosed from adjudicating the merits and from weighing the relative persuasiveness of dueling expert opinions on the merits of plaintiffs' claims.") (citing *Eisen* and *Caridad*).

[7] *See, e.g.*, Trans. of Arg. Before 2nd Cir. at 12 ("[W]e don't quarrel with *Caridad* at all . . . . "); Pet. for 2nd Cir. Rehearing at 7 n.8 ("It is not our position that *Caridad* was wrong" in refusing to engage in a battle of the experts.).

was whether it was "fatally flawed," "inadmissible," or "implausible."[8]

D. Defendants Are Seeking to Overturn *Eisen*

Defendants are not asking this Court to address the so-called "confusion" among the circuits concerning *Eisen*. They are asking this Court to overrule *Eisen*. Regardless of whether any other district court misinterpreted *Eisen*, the district court here surely did not. The court carefully reviewed the parties' expert submissions, both individually and in light of each other, and rigorously considered an extensive evidentiary record. The only thing the court did not do was make a preliminary determination of the merits. Neither *Eisen* nor any of defendants' so-called "conflicting" cases require this ultimate step. On the contrary, they strictly forbid it:

> The success of the 1966 amendments (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones. A court may not say something like "let's resolve the merits first and worry about the class later" (Rule 23(c)(1) requires the certification decision to be made "[a]s soon as practicable . . . .") or "I'm not going to certify a class unless I

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[8] *See, e.g.*, JA 518, 540-42 (asserting "fatally flawed" and "admissibility" standard); Def. Rule 23(f) Pet. at 11, 13-14, 16, 18-19, 21, 23-24, 35 (asserting "plausibility" standard); Def. 2nd Cir. Br. at 14, 20-23, 25-26, 34 (asserting "fatally flawed" and "plausibility" standard). At oral argument before the Second Circuit, defendants refused the court's invitation to draw any distinction between a "fatally flawed" and "plausibility" standard. *See* Trans. of Arg. Before 2d Cir. at 52-53; *See also* Def. 2nd Cir. Br. at 21-22 (defendants equate "facially implausible" with "fatally flawed.").

> think that the plaintiffs will prevail." [*Szabo*, 249 F.3d at 677.]

See also Castano, 84 F.3d at 744 (*Eisen* stands for the "unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision.").

Defendants' challenge is therefore a direct attack on *Eisen* and its well-understood holding that a Rule 23 inquiry cannot include a preliminary determination of the merits. The dissent acknowledged the powerful policy reasons behind this holding: "The rule against pre-certification decisions on the merits is non-partisan and serves neutrally to avoid the risk that a 'court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings.'" App. 39a (citing *Eisen*, 417 U.S. at 178).

Defendants' request for a clear articulation of the scope of a Rule 23 inquiry is misplaced since, as defendants recognize, this Court has already provided it. Pet. 19-20 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'") (citation omitted); and *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.")).

Coopers, *Falcon*, and *Eisen* taken together set a clear standard which the district court scrupulously followed:

> A court may certify a class action only if it is "satisfied, after rigorous analysis," that the rule's prerequisites have been established. [citing *Falcon.*] This analysis will inevitably be "enmeshed in the factual and legal issues comprising the

> plaintiff's cause of action." [citing *Falcon* and *Coopers.*] In some cases, . . . it will be necessary to conduct discovery to establish a sufficient evidentiary record from which to make the class determination. . . . "[T]he question is not whether the plaintiff . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met." [citing *Eisen.*] [App. 73a-74a (citations omitted).]

This standard has been followed in every circuit, including those where defendants vainly search for a conflict. *See, e.g., Szabo*, 249 F.3d at 677; *Castano*, 84 F.3d at 744 & n.17; *Waste Mgmt.*, 208 F.3d at 297-98.

II. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUE OF MANAGEABILITY

A. Defendants' Manageability Question Has No Application to this Case

Defendants contend that the district court refused to decide *existing* and *identifiable* manageability problems stemming from an alleged need for individualized damages determinations. *See* Pet. (i), 4, 20-23. Not only were there no such problems before the district court, but defendants never even asserted a manageability/damages argument.

Defendants *did* assert that plaintiffs could not prove common injury-in-fact because of the alleged ability of some merchants to "steer" customers away from defendants' debit cards (which they are contractually required to accept). The district court rejected this argument but advised defendants that it might be "repackaged" as a damages mitigation argument. App. 90a. Typical of its forward-looking analysis, the district court went on to consider this yet-to-be raised mitigation

argument and the various class action tools that could be used to address any manageability issues that might arise. App. 90a-91a, 97a. Thus, far from hiding from any *existing* and *identifiable* manageability issues, the court went out of its way to consider manageability issues that were not raised, and might never be ripe.[9]

B. There Is No Conflict Among the Circuits Here

Defendants' manageability cases bear no relation to this case. Each one involved a district court that had to deal with real and ripe manageability issues. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (substantial evidence of "serious problems now appearing"); *In re Hotel Tel. Charges*, 500 F.2d 86, 89, 92 (9th Cir. 1974) ("no possibility that common questions can

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[9] There is no support in the record for Judge Jacobs' assertion that the purported mitigation/manageability problem "has been 'apparent' from the outset." App. 40a. First, he ignored the manageability findings of both courts. Second, he ignored the evidence of the numerous common issues which riddle defendants' mitigation defense, which demonstrates that merchants cannot steer, and which is the subject of plaintiffs' pending motion to dismiss the defense: (i) defendants' rules prohibit steering; (ii) defendants have disguised their debit cards to look like credit cards to prevent merchant attempts to steer; (iii) defendants' tying rules and related anticompetitive conduct have caused banks to actively impede merchant attempts to steer; (iv) merchant attempts to steer lead to substantial customer service problems; and (v) it is not possible for any merchant to steer cost-effectively. *See, e.g.* JA 2189-92 and evidence cited therein. Judge Jacobs not only failed to account for any of this evidence, he also failed to address the proper legal standard for evaluating the mitigation defense; namely, defendants must show that mitigation is feasible and cost-effective. *See, e.g., Litton Sys., Inc. v. American Tel. and Tel. Co.*, 700 F.2d 785, 820 (2d Cir. 1983); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir. 1981).

predominate" leading to "mind-boggling manageability problems"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("A single litigation addressing every complication in every model of prosthesis, including changes in design, manufacturing, and representation over the course of twenty-two years, as well as the unique problems of each plaintiff, would present a nearly insurmountable burden on the district court."); *Newton*, 259 F.3d at 191 ("The need for individualized inquiry into actual injury [would be] . . . 'a mind-boggling undertaking.' . . . With hundreds of millions of trades, it is difficult to imagine how this case can be tried.") (citation omitted); *Castano*, 84 F.3d at 742 n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.").

None of these cases hold that a district court should refuse to certify a class on the basis of manageability problems that might appear in the future. Indeed, *Windham* holds just the opposite: "Concededly, a district court should not decline to certify a class because it fears that insurmountable problems may later appear." 565 F.2d at 70. Rather than "postpone" its manageability determination as defendants pretend (Pet. 21-23), the district court made a firm determination based on the facts before it. The court took the additional step of considering whether and how it could deal with any individual damages issues that might arise. App. 23a, 90a-91a, 97a. Defendants' attempt to characterize this forward-looking and preemptive rigor as a failure to exercise any discretion is wrong.

The Second Circuit thoroughly reviewed the district court's damages/manageability determination despite acknowledging that defendants did not brief the argument

in the district court. App. 17a n.7. In upholding the lower court's discretion, the Second Circuit relied on:

- The district court's finding "that damages could be determined with the aid of a class-wide formula" (App. 23a);
- The district court's consideration of "how it would address any individualized issues that might arise" (*Id.*);
- The existence of numerous management tools available to the court to address any such individualized issues including bifurcation, appointment of a special master, decertification, creating subclasses, and amending the class (App. 22a-23a);
- The presumption against denying certification based on manageability alone (App. 21a);
- The fact that the viability of, and majority of issues relating to, defendants' unasserted damages/mitigation defense is subject to common proof, and that plaintiffs have moved for summary judgment to dismiss the defense (App. 18a & n.8, 20a).

The Second Circuit also considered the inherent manageability of this case compared to one of the principal cases on which defendants relied below, *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1983):

> In stark contrast [to *Abrams*], the action before us involves only two products . . . with set interchange fees and class members who can be identified by defendants' own records. In this action, unlike in *Abrams*, there are no individualized issues relating to each plaintiffs' [sic] relationship with Visa and MasterCard because defendants' "honor all cards" rule contractually applied to each of the plaintiffs . . . . Additionally, plaintiffs here, unlike in *Abrams*, have alleged a

> common practice affecting each member of the class and have proffered a damages formula to assist with the calculation of damages. [App. 24a.]

The Second Circuit further emphasized that the question of manageability is "peculiarly within [the district court's] discretion." App. 23a (citing *Windham*, 565 F.2d at 65). *Windham* explains why:

> This is so because the [manageability] issue is one of fact, subject to determination by the district court; it is "a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion." And this is particularly true in actions governed by Rule 23(b)(3). [565 F.2d at 65 (citation omitted).]

Newton concurs: "Turning to manageability, the District Court's evaluation must be 'granted a wide range of discretion. Manageability is a practical problem, one with which a district court generally has a greater degree of expertise and familiarity than does the appellate court.'" 259 F.3d at 191 (citations omitted). *See also* App. 21a-22a (citing *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972) ("[F]or a court to refuse to certify a class . . . because of vaguely-perceived management problems . . . discount[s] too much the power of the court to deal with a class suit flexibly, in response to difficulties as they arise.")). Affording the district court such "a wide range of discretion" is particularly appropriate here where the court (i) performed an exhaustive Rule 23 analysis, (ii) even considered unripe and unraised manageabilty issues, and (iii) supervised this case for more than three years with its voluminous discovery record, from which the class record was culled.

III. THIS CASE PRESENTS NO ISSUE FOR THIS COURT TO DECIDE

This case does not present any issue on which there is a conflict among the circuits. The lower courts' decisions reveal an extraordinarily rigorous analysis of the Rule 23 requirements, including an extensive and forward-looking manageability inquiry. The lower courts went to the limits of what *Eisen* permits, without rendering the preliminary merits determination proscribed by *Eisen*.

There are three actual bases for defendants' petition. First, they seek to overrule *Eisen* and bypass the procedure established by Congress for changing Rule 23.[10] Second, defendants seek to extend the more than two-year delay that the Rule 23(f) procedures have so far entailed.

Third, defendants make an alarmist doomsday plea that the Court disregard the rigor of the lower courts' analyses, because they say that class certification "creates enormous coercive pressure" (Pet. 24); "creates hydraulic pressure on defendants to settle" (Pet. 25); and amounts to "'judicial blackmail.'" *Id.* (citation omitted). Defendants' predicament is not a product of coercion or blackmail. It is the product of their conduct and the requirements of Rule 23, rigorously analyzed and applied in a case where the Second Circuit said that "[g]iven the strong commonality of the violation and the harm among the merchants, this is

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[10] As this Court recently recognized, "we are bound to follow Rule 23 as we understood it upon its adoption, and [] we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). This process entails "an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

precisely the type of situation for which the class action device is suited." App. 31a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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INTEREST OF THE *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, the Independent Community Bankers of America, America's Community Bankers, the Delaware Bankers Association, the New Mexico Bankers Association, the New York Bankers Association, The New York Clearing House Association L.L.C., the North Carolina Bankers Association, the Oklahoma Bankers Association, and the South Carolina Bankers Association, submit this brief as *amici curiae* in support of the petition for a writ of certiorari.[1] Together, the *amici* state and national banking associations represent many of the financial institutions that, as participants in Petitioners' Visa and MasterCard payment systems, issue Visa and/or MasterCard credit and debit cards and process credit and debit transactions at issue in this case.

The American Bankers Association (ABA) is the principal national trade association of the banking industry in the United States. Its members are located in each of the fifty states and the District of Columbia and include banks of all sizes offering various financial services. ABA

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[1] The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to this brief's preparation or submission. Many of the financial institutions that are members of the *amici curiae* banking associations, including those financial institutions that contributed financially to this brief's preparation and submission, participate, like thousands of banks throughout the United States, in Petitioners' Visa and MasterCard payment systems.

members hold approximately ninety percent of the domestic assets of the United States banks. The ABA frequently appears as an *amicus curiae* in cases that raise issues of widespread concern to banks or consumers of banking services.

The Consumer Bankers Association (CBA) was founded in 1919 to provide a collective voice for the retail banking industry. The CBA represents over 750 federally insured banks and thrift institutions that hold more than eighty percent of all consumer deposits and more than seventy percent of all consumer credit held by federally insured depository institutions in the United States. The CBA regularly monitors the impact that consumer issues have on retail banks.

The Financial Services Roundtable (the "Roundtable") is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through their respective chief executive officers and other senior executives. Roundtable member companies account for $17 trillion in managed assets and $462 billion in revenue and provide 1.6 million jobs.

The Independent Community Bankers of America (ICBA) represents community banks and community financial institutions. The ICBA's membership includes some 5,000 community banks which hold more than $511 billion in insured deposits, $624 billion in assets, and more than $391 billion in loans for consumers and small businesses.

America's Community Bankers (ACB) is the national trade association for nearly 1,200 community

banks of all charter types and sizes. ACB members, whose aggregate assets exceed one trillion dollars, pursue progressive, entrepreneurial, and service-oriented strategies in providing financial services to benefit their customers and communities.

The members of the Delaware Bankers Association (DBA) are national and state-chartered commercial banks, trust companies, and savings banks that hold assets in, or are authorized to accept deposits in, the state of Delaware. The DBA assists its member financial institutions with compliance concerns, governmental relations, education, and community outreach.

The New Mexico Bankers Association (NMBA) is a trade organization representing a broad membership of commercial banks and savings and loans. Its membership accounts for over ninety percent of banking assets in New Mexico. The NMBA provides its members with governmental relations, legal compliance, communications, and education services.

The New York Bankers Association is comprised of community, regional, and money center commercial banks in the State of New York, including approximately 55% state-chartered banks and 45% national banks, which in the aggregate have over 210,000 employees and assets in excess of one trillion dollars.

The New York Clearing House Association L.L.C. (the "Clearing House") is an association of eleven of the nation's leading commercial banks. The members of the Clearing House are Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National

Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. The Clearing House regularly files *amicus* briefs on issues that are of broad industry concern.

The North Carolina Bankers Association (NCBA) is a trade group that was established in 1897 and now consists of 137 North Carolina financial institutions. The NCBA provides regulatory and compliance assistance and other services to its member financial institutions, and serves as a liaison between its members and the federal and state legislatures and regulators.

The Oklahoma Bankers Association (OBA) was created in 1897 and now serves nearly 290 Oklahoma member banks. The OBA assists its members with legal and compliance services, government relations, communications, and other areas of common concern.

The South Carolina Bankers Association (SCBA) is a professional trade association representing the financial services industry in South Carolina. The SCBA has represented the common interest and welfare of South Carolina banks and thrift institutions for 101 years.

SUMMARY OF ARGUMENT

A. For over four decades, the credit card and debit card payment systems developed by Visa, MasterCard, and other financial networks have contributed substantially to America's economic growth. Without convenient, fast, and secure card payment systems, many of the kinds of transactions that take place by the thousands every minute in stores, over the telephone, and over the Internet would be impossible.

The instant class action is an attempt to effect a broad restructuring of credit card and debit card pricing policies through a single lawsuit. Respondents have endeavored to amass a plaintiff class consisting of more than four million merchants in the United States retail industry and to pit this enormous class against the country's two largest card payment systems, each of which has thousands of participating banks that issue credit and debit cards and process card transactions. Respondents understandably chose as the forum for this lawsuit a district court within the Second Circuit, given that the standards for certification in the Second Circuit are among the most permissive in the nation.

As a result of the class certification in this case, absent this Court's intervention, the future debit and credit card pricing policies of the nation's two predominant card payment systems are likely to be determined not through commercial negotiation between merchants and the payment systems, or through carefully constructed regulatory measures, but through a coerced settlement. The motivation for this settlement will not be the merits of the claims underlying this lawsuit, but the staggering potential liability that the Petitioners face as a result of the accumulation of millions of claimants in a single lawsuit. *See* Pet. App. 36a (Jacobs, J., dissenting). Respondents' effort to use the class action device to change the operations of thousands of financial institutions that participate in the Visa and MasterCard payment systems highlights the dangers inherent in the Second Circuit's erroneous class certification standards. Those standards too easily permit the cobbling together of industry-wide classes, with potentially devastating economic effects for individual companies or whole industries.

B. The certification standards that the district court and the Second Circuit applied in this case conflict with the plain meaning of Rule 23 of the Federal Rules of Civil Procedure, with this Court's recent class certification decisions, and (as set forth in the Petition) with the interpretation of the Rule by other circuit courts of appeals. According to the Second Circuit, a district court should certify a class if the evidence in favor of certification is not "fatally flawed" and is "sufficient" to fulfill Rule 23's certification criteria—whether or not such evidence in favor of certification is persuasive. The court of appeals thus affirmed the district court's class certification based on the erroneous view that a district court should not weigh conflicting expert evidence.

Rule 23(b)(3), however, allows a district court to certify a class action only if the court "finds" that common questions of law or fact predominate and that the class action method is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3). The Rule also lists four factors as "[t]he matters pertinent to the findings." *Id.* The Rule's repeated use of the word "find" calls for the weighing of competing evidence offered in connection with the (b)(3) criteria. In both of this Court's most recent class certification decisions, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court emphasized the close look that Rule 23 requires district courts to take in deciding on class certification. The Second Circuit's standards expressly avoid the searching scrutiny that the text of Rule 23 and this Court's decisions require.

The findings that Rule 23 demands are similar to other preliminary determinations that district courts routinely make, such as those under Rules 12(b)(1) and 12(b)(2), which may overlap to a certain degree with the

merits of a case. Any findings by a district court as to Rule 23 certification factors that overlap in some respects with merits issues need not be dispositive of those merits issues themselves. The weighing of competing evidence at the certification stage thus does not run counter to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Rather, as several courts of appeals other than the Second Circuit have held, class certification must be based on critical evaluation of the parties' evidence regarding Rule 23's criteria.

ARGUMENT

THE COURT SHOULD GRANT REVIEW BECAUSE OF THE IMPORTANCE OF THIS CASE TO CARD PAYMENT SYSTEMS AND BECAUSE OF THE CONFLICT BETWEEN THE SECOND CIRCUIT'S CERTIFICATION STANDARDS AND THE RULINGS OF THIS COURT AND OTHER CIRCUITS.

A. The Certification Of The Plaintiff Class In This Case Improperly Threatens To Force Readjustment of Card Pricing Policies Affecting Thousands of Banks Through A Settlement Coerced By The Scope Of The Class Rather Than The Merits Of Plaintiffs' Claims.

The class certification that the Second Circuit affirmed in this case has the potential of coercing macro-level readjustment of payment card pricing policies through a settlement entered into as a result of the size of the plaintiff class, not because of the merits of the lawsuit. Granted without any finding that the evidence in favor of certification is more persuasive than the evidence against it, the certification of the plaintiff class here pits nearly the entire United States retail industry against Petitioners Visa and MasterCard, two payment systems upon which

thousands of banks and millions of consumers rely. If the class certification stands, the enormous potential liability facing Visa and MasterCard may leave them with no practical choice but to settle the millions of claims now amassed against them. Review by this Court is essential, not only to prevent a non-merits-based settlement of this litigation, but also to ensure that the Second Circuit and other federal courts apply proper class certification criteria.

1. Visa and MasterCard are both not-for-profit associations with thousands of participating banks and other financial institutions that annually handle billions of dollars in transactions using plastic cards for goods and services at a wide variety of retail establishments, as well as on the Internet, by telephone, and at automated teller machines. These card payment systems have transformed American and worldwide retail business over the last generation to the benefit of millions of consumers and small businesses.

Entire industries—including retail stores, airlines, catalog merchants, and electronic commerce—are dependent on the expansion of credit card and debit card use, not only because of the on-site retail transactions that such cards permit, but also because these card payment systems have made possible prompt and secure transactions between buyers and sellers at great distances from each other. *See, e.g.*, *Santa Fe Natural Tobacco Co., Inc. v. Spitzer*, No. 00 CIV. 7274, 7750, 2001 WL 636441, at *19 (S.D.N.Y. June 8, 2001) (90% of Internet sites require payment by credit card). These payment systems developed in perhaps the most highly—and most successfully—regulated sector of the economy. *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963) (federal regulation of the banking industry is "'[p]robably the outstanding example in the federal

government of regulation of an entire industry through methods of supervision'") (quoting 1 Kenneth Culp Davis, *Administrative Law* § 4.04, at 247 (1958)) (alteration in original); *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996) ("We said in *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947), that '[b]anking is one of the longest regulated and most closely supervised of public callings.'").

2. The class certification ruling below presents a grave risk that future pricing and availability of substantial segments of debit and credit payment services will be determined through settlement negotiations coerced by the potential liability now facing Visa and MasterCard in this lawsuit. The class certified below includes all persons or business entities that have accepted Visa and/or MasterCard credit and debit cards during the fullest period permitted by applicable statutes of limitations—a class consisting of approximately four million retail and other businesses. Pet. App. 5a, 35a-36a. The district court acknowledged that the potential liability facing Visa and MasterCard in the present class action is "enormous." Pet. App. 98a. As Judge Jacobs recognized in dissent, Petitioners' potential exposure could "coerce settlement" regardless of the merits of Respondents' claims. Pet. App. 36a.[2] *Cf. In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, Nos. 02-1437, 02-1438 & 02-1439, 2002 WL 831990, at *2 (7th Cir. May 2, 2002) (noting that the

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[2] Moreover, in the present case, class certification cannot be justified by any need to ensure a remedy for alleged wrongdoing. The named plaintiffs in this case include some of the largest retailers in the United States and, indeed, the nation's largest company of any kind. Several of the named plaintiffs have asserted huge damages claims in the lawsuit and are capable of efficiently prosecuting those claims in individual lawsuits against Visa and MasterCard.

aggregation of millions of disparate claims in a class action suit "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims").

Any such settlement would likely involve insistence by Respondents on prospective policy changes by Visa and MasterCard that would, in turn, require Visa's and MasterCard's thousands of participating banks, including members of the *amici* associations, to make important pricing changes. The macroeconomic consequences of such changes would be felt not only by the banks, but by the tens of millions of customers who rely on the card payment systems that Visa and MasterCard facilitate. Unlike the results of a single litigated case—which can be determined on the merits of the evidence presented—or the results of carefully planned governmental regulation, policy changes extracted from class action defendants through coerced settlements cannot be expected to depend on the merits of the underlying claims.

Banks are particularly susceptible to the effects of erroneous class certifications because of the banks' regulatory obligations to operate in accordance with safety and soundness standards, their responsibilities to their depositors and their communities, and their dependence on their reputation in order to retain their depositors and other customers. All of these factors militate in favor of settlement in the face of an erroneously certified class, even when the underlying action is of dubious merit.[3] The

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[3] *Amici* do not contend that the banking and financial services industries should be immune from class actions or antitrust claims. Rather, *amici* emphasize the necessity of a close look at the class

potential that banking policy changes could be coerced through erroneous class certification stands in stark contrast to the care with which Congress, federal agencies, and the states have regulated the financial services industries (or declined to regulate aspects of those industries).[4]

3. As illustrated in this case, the Second Circuit's improper certification standards allow plaintiffs seeking a tactical advantage to cobble together inappropriate industry-wide classes. Individual companies or whole industries named as defendants thereby face risks far greater than they safely can bear. A court's class certification in such a case without evaluating competing evidence regarding certification criteria essentially "amounts to a delegation of judicial power to the [class proponents]." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

In light of the ease with which the Second Circuit's standards permitted certification of the four-million-member plaintiff class of retailers in this case, it is likely that, absent intervention by this Court, class action lawyers armed with "not-fatally-flawed" expert testimony regarding certification standards will regularly head to the Second Circuit in attempts to craft lawsuits in which whole industries face off in the district courts, rather than in legislative chambers or in the marketplace. The Second

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certification stage to ensure that such class actions are proper, and not improvidently allowed.

[4] Although Congress and the federal agencies charged with regulating banks have not chosen to regulate the contractual interchange fee provisions at issue in this case, Respondents' class action could have the practical effect of doing so by coercing policy changes through settlement.

Circuit's standards will thus exacerbate the existing tensions created by the "big business" of class actions and the attendant pressure to settle that has repeatedly been labeled, by the courts and others, as a form of "blackmail." *See* Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward A Principled Approach*, 96 Nw. U. L. Rev. 755, 756–57 (2002) [hereinafter Mackay, *Appealability*] ("Class actions are now 'big business,' and courts often criticize them as 'legalized blackmail.'") (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("judicial blackmail"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("legalized blackmail"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (calling class action settlements "blackmail settlements")); *see also* Mackay, *Appealability* at 809 n.10 ("A recent survey of Fortune 500 companies found that from 1988 to 1998, class action filings against those companies increased by 338% in federal courts and by more than 1000% in state courts." (citing Federalist Society, *Analysis: Class Action Litigation–A Federalist Society Survey*, 1 Class Action Watch 1, 5 (1999); Deborah Hensler et al., *Preliminary Results of the Rand Study of Class Action Litigation*, 1997 Inst. Civ. Just. 15)).

The class action mechanism was not designed for the purpose of enabling industries to bring lawsuits such as the present case. As this Court emphasized in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969)). Indeed, Rule 23 was originally written to

encourage civil rights reform litigation and later expanded to facilitate access to the courts for litigants needing to pool small claims. *See The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of John P. Frank, Lewis and Roca, Phoenix, Arizona) ("If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation."). As a glance at the caption of this case makes apparent, the present class action bears no resemblance to the lawsuits that are Rule 23's primary concern.

B. The Second Circuit's Standards For Class Certification Conflict With The Text Of Rule 23, With The Decisions Of This Court, And With Holdings Of Other Circuit Courts Of Appeals.

1. The propriety of class certification in the present case turns on whether, as required by Rule 23(b)(3), common questions of law and fact predominate, and on whether a class action is superior to other available methods of adjudication.[5] In the district court, Petitioners Visa and MasterCard presented compelling expert evidence that common questions did not predominate among members of the proposed class. For example, Petitioners' expert explained that, with respect to the injury-to-business-or-property element of plaintiffs' antitrust claims

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[5] Although the district court found that the class was certifiable under Rule 23(b)(2) as well as (b)(3), the Second Circuit declined to reach the (b)(2) issue. Pet. App. 33a. The Petition therefore does not raise that question.

(separate and apart from damages), the proposed class members differed markedly from each other. *See* Pet. App. 14a-15a, 45a-48a, 64a-65a, 80a-84a. [6]

Petitioners' extensive expert evidence in opposition to certification was offered in vain, however. Reciting that "'a motion for class certification is not an occasion for examination of the merits of the case,'" Pet. App. 11a (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999)), the Second Circuit affirmed the class certification based on its view that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" at the certification stage. Pet. App. 12a (quoting *Caridad*, 191 F.3d at 292-93).[7]

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[6] This is not a case where only the issue of *damages* is unsusceptible to common proof or manageability. Rather, Respondents seek relief under a cause of action that requires, *as an element of liability itself*, that each plaintiff class member prove antitrust injury. *See* 15 U.S.C. § 15 (Section 4 of the Clayton Act, providing a cause of action for treble damages for "any person who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws" (emphasis added)). As the district court in this case recognized: "The *fact* of injury, which is required as an element of the plaintiff's claim, should not be confused with the *extent* of injury (as reflected by the amount of damages), which may not be amenable to establishment with great precision." Pet. App. 81a (citing *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982)). Because the fact of injury is an element of liability, it must be proved by common proof at the liability stage; the possibility of later decertification of the class (or division of the class into subclasses) for trials on damages does not cure the problem.

[7] The Second Circuit's approving quotations of formulations by federal district courts of the standard supposedly to be applied to the evaluation of evidence offered in support of certification suggest that the Second Circuit's standard is so easily met as barely to warrant the appellation "standard" at all:

In other words, according to the Second Circuit, a district court is not to weigh conflicting expert evidence on certification factors. Rather, as long as the expert evidence in favor of certification is not "fatally flawed" (*i.e.*, as long as such evidence is admissible), the court may rely upon the evidence as satisfying certification criteria if it finds that such expert evidence is "sufficient" to meet such criteria. Pet. App. 11a-12a. That is so even if judicial *evaluation* of competing evidence that the parties presented might have led to the conclusion that class certification should be denied.[8] Thus, the Second Circuit's standards enabled Respondents to obtain class certification without having to subject to judicial evaluation, much less decision, the serious questions raised by Petitioners' expert evidence.

2. The Second Circuit's approach is contrary to the plain terms of Rule 23(b)(3). That rule allows a lawsuit to be maintained as a class action only if the district court

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> *See . . . In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 ([M.]D. Fla. 1996) (granting class certification upon finding that "Plaintiffs have demonstrated at least a 'colorable method' of proving [common injury] at trial"); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 687 (D. Minn. 1995) (stating that "in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all").

Pet. App. 11a-12a.

[8] The Second Circuit in the present case also improperly postponed deciding whether the class was manageable, even though Rule 23 expressly lists manageability as a "matter pertinent to the findings" required for certification of a (b)(3) class action. *See* Fed. R. Civ. P. 23(b)(3)(D) (listing as a certification factor "the difficulties likely to be encountered in the management of a class action").

"finds" that common questions predominate and that the class action method is superior to other adjudication methods. The Rule enumerates four factors as "matters pertinent to the *findings*" (emphasis added). It is difficult to imagine what Rule 23 could contemplate in its repeated use of the word "find" other than a court's weighing of competing evidence offered in connection with the (b)(3) criteria. In the context of a "predominance" inquiry, this necessarily means that the court must evaluate expert testimony that the parties submit on whether common questions predominate.

Nor can the Second Circuit's approach be squared with this Court's decision in *Amchem*. *Amchem* explains that Rule 23(b)(3) requires a "court's 'close look' at the predominance and superiority criteria" and that "the predominance criterion [of Rule 23(b)(3)] is far more demanding" than Rule 23(a)'s threshold requirement that common questions simply exist. *Amchem*, 521 U.S. at 615, 623-24 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 Harv. L. Rev. 356, 390 (1967)). The Second Circuit's approach is overly deferential to the evidence put forth by plaintiffs, and, as a practical matter, eviscerates the "far more demanding" predominance criterion. In the Second Circuit, expert evidence need not be persuasive on the certification factors when measured against contrary evidence. Therefore, the Second Circuit's approach falls far short of the "findings" required by the text of the Rule and the "close look" demanded by *Amchem*.

Moreover, in the related context of "limited fund" class certification, this Court has held under Rule 23(b)(1)(B) that a district court must make "findings of fact" after a proceeding in which the evidence may be

challenged. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999). The Court so held in *Ortiz* even though the "limited fund" provision of the Rule does not use the term "findings," as Rule 23(b)(3) does.

The courts below did not undertake an independent evaluation as to whether, in light of contrary evidence presented by the defendants, Respondents had in fact demonstrated that common questions existed and predominated. An independent evaluation, which this Court has recognized that Rule 23 *requires* at the certification stage, surely mandates the very weighing of conflicting evidence that the Second Circuit in this case expressly stated was *forbidden* at the certification stage.

3. Contrary to the apparent supposition of the Second Circuit in the present case, Pet. App. 12a, a judicial "close look" into the Rule 23(b)(3) factors does not run counter to this Court's instruction in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), that Rule 23 does not confer on district courts "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Indeed, this Court expressly stated in *Eisen* that the inquiries forbidden to a district court at the certification stage were "'whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits,'" not "'whether the requirements of Rule 23 are met.'" *Id.* at 178 (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971) (Wisdom, J.)); *see also Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, 895 (7th Cir. 1981) ("*Eisen* has not been interpreted so broadly . . . as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of the plaintiff's particular individual

claim."); *accord Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

As the Seventh Circuit has observed, the inquiry and findings called for by Rule 23 are similar to other inquiries that district courts routinely make under Rules 12(b)(1) and 12(b)(2), notwithstanding that such inquiries may overlap in some respects with the merits of a case. For example, "[w]hen jurisdiction or venue depends on contested facts—even facts closely linked to the merits of the claim—the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed." *Szabo*, 249 F.3d at 676-77.

4. As further explained in the Petition, Pet. 14-20, this case presents a square conflict among numerous circuit courts of appeals that will likely lead to forum shopping among class action plaintiffs. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1256, 1257 n.12 (2002) (noting circuit conflict). In stark contrast to the Second Circuit's approach in the present case, the Seventh Circuit recently held that a district court at the certification stage "may not duck hard questions by observing that each side has some support." *West*, 282 F.3d at 938. The Seventh Circuit emphasized that "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* In light of the conflict among the courts of appeals that this case presents, as well as the inconsistencies between the Second Circuit's approach and not only the plain text of Rule 23(b)(3), but also this Court's decisions in *Amchem* and *Ortiz,* the Petition warrants this Court's review.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
Petitioners,

v.

WALMART STORES, INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF AMERICAN RAILROADS, CALIFORNIA BANKERS ASSOCIATION, EUROPEAN-AMERICAN BUSINESS COUNCIL, THE FERTILIZER INSTITUTE, INSTITUTE OF INTERNATIONAL BANKERS, MORTGAGE BANKERS ASSOCIATION OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND TEXAS BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. (Alliance) is a trade association composed of 13 car and light truck manufacturers, which account for more than 90 percent of U.S. vehicle sales. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues.

The American Chemistry Council, formerly known as the Chemical Manufacturers Association, represents the leading companies engaged in the business of chemistry. The business of chemistry is a $460 billion enterprise and is the nation's largest exporter. Chemistry companies invest more in research and development than any other business sector.

The American Council of Life Insurers (ACLI), a non-profit trade association, is the largest trade association in the United States representing the life insurance industry. The ACLI's members include 399 legal reserve life insurers, accounting for 76 percent of life insurance premiums in the United States. ACLI advocates the interests its members before federal and state legislators, state insurance departments, federal regulatory agencies, and the courts.

The American Insurance Association (AIA) is the leading property and casualty insurance trade organization, representing more than 410 insurers that write more than $87 billion in premiums each year. AIA represents its members at the federal level and in every State in legislative, regulatory, and legal forums.

The American Petroleum Institute (API) is the nation's largest petroleum industry trade association. API's more than 400 members represent all aspects of the petroleum industry, from the search for and extraction of oil and natural gas to the marketing of finished products in the United States and abroad.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Counsel for *amici curiae* wrote this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

The Association of American Railroads (AAR) is a trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and courts.

The California Bankers Association (CBA), one of the largest state banking trade associations, provides comprehensive representation of the California banking industry's interests in the judicial and legislative arenas. The CBA regularly files *amicus* briefs in matters affecting the banking industry.

The European-American Business Council, comprising more than 70 European Union and United States companies, is the leading business association active on transatlantic trade, tax, investment, and policy issues.

The Fertilizer Institute (TFI) represents the makers, providers, and transporters of fertilizer. TFI works with Congress and regulators to preserve and promote the United States fertilizer industry.

The Institute of International Bankers is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership comprises approximately 150 banking organizations headquartered in 50 countries.

The Mortgage Bankers Association of America (MBA) is the primary national trade association devoted exclusively to the field of real estate finance. MBA represents its more than 2500 members, which are engaged in all facets of mortgage lending, in legislative, regulatory, and judicial arenas.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents leading research-based pharmaceutical and biotechnology companies, which invested more than $30 billion in 2001 in discovering and developing new medicines.

The Texas Bankers Association (TBA), the largest and oldest state bankers association in the United States, is the leadership organization and principal advocate for Texas banks. The TBA frequently files briefs in support of the interests of Texas banks in appellate cases.

Members of the *amici* are routinely named as defendants in litigation in which plaintiffs seek class certification. Class certification regularly transforms a routine lawsuit into a "bet-the-company" proposition. Asbestos litigation, for example, is perhaps the largest challenge facing AIA's members today. And rather than face the risk — no matter how small — of an adverse jury verdict, *amici*'s members are coerced into settlements. For example, members of the American Chemistry Council have been forced to settle product liability class actions. Alliance members General Motors and Ford Motors have each paid multimillion-dollar settlements in product liability class actions. In the 1990s, life insurance companies settled seven class actions for a total of at least $700 million.

These settlements — often aptly described by Judge Friendly's phrase "blackmail settlements" — hurt the members of the *amici* and their customers. Settlements in these actions, for example, drive up the price of product liability insurance. Consumers are also hurt by the deterrent effect these suits have on innovation. The threat of class litigation against new products developed by members of PhRMA, for example, deters the introduction of potentially life-saving medicines.

Because of their significant experience in these matters, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on the certification of

class actions; indeed, class certification can transform a relatively modest case into one with hundreds, thousands, or millions of claimants and billions of dollars in damages. Here, the order certifying the class transformed this case into one with four million business plaintiffs, including the largest company in America, and up to $100 billion at stake in one massive lawsuit (Pet. App. 35a-36a). Many who have studied class certification decisions criticize decisions that, like the majority opinion below, permit class certification without fully addressing and resolving the difficulties posed by certification.

Amici take no position on the merits of the underlying antitrust action; indeed, some members of certain *amici* are likely members of the plaintiff class. Nonetheless, *amici* concur with petitioners, and with Judge Jacobs in dissent, that the majority decision rests on an incorrect interpretation of Federal Rule of Civil Procedure 23 and this Court's precedents.[2] And *amici* agree with petitioners that the majority opinion is in conflict with other federal appellate courts with respect to both battle-of-the-experts and manageability issues. Because the petition fully addresses the splits among the circuits and the legal errors in the Second Circuit's opinion, *amici* will not. Rather, this brief will address why it is intolerable to let the circuit splits linger.

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[2] Respondents' brief in opposition, which they filed early, debates the relative merits of the Carlton and Schmalensee expert testimony at length and emphasizes the effort the courts below put into analyzing that testimony. From *amici*'s standpoint, respondents have completely missed the point. The relative merits of the Carlton and Schmalensee declarations are just what the Second Circuit said the courts could *not* consider, Pet. App. 11a-12a, carrying forward a legal rule that *amici* regard as wrong and dangerous. And a diligent analysis under the wrong legal standard is no better than a cursory analysis under the wrong legal standard. *Amici* themselves have no position on the relative merits of the Carlton and Schmalensee testimony, but urge the Court to hold that relevant conflicts in expert testimony *must* be resolved at the class certification stage.

I. A. The majority's rule results in the certification of actions inappropriate for class treatment. The Second Circuit's holding routinely favors plaintiffs by permitting an action to be certified based on expert testimony that may be wrong (Pet. App. 12a) and by permitting an action to be certified before resolving potentially intractable manageability problems (see *id.* at 22a). This "excessive deference" (*id.* at 43a) to requests for class certification allows manipulation of the process.

B. Certification of a class coerces defendants into settlement. Defendants simply cannot risk a jury verdict awarding damages to thousands of plaintiffs, let alone the millions — some themselves gargantuan — that are members of the class certified in this case. Moreover, the certification of a class also results in increased costs of litigating the action and increased damage to defendants' reputation.

II. Erroneous certification results in substantial unfairness to the parties to a purported class action.

A. In 1998, Rule 23 was amended to permit the appeal of an adverse class certification decision. See Fed. R. Civ. P. 23(f). The obvious purpose of Rule 23(f) is to *get it right* at the certification stage, yet the Second Circuit has turned the Rule 23(f) appeal into a mere inquiry into the *sufficiency* of plaintiffs' expert testimony.

B. Giving plaintiffs leverage, by certifying a class, to exact a settlement is unfair to defendants when plaintiffs' suits are weak. Defendants are forced into settling meritless cases because they cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Because of the intense pressure to settle, the "safeguards" of decertification and sub-classes, relied on by the majority to justify a possibly erroneous certification, offer no protection at all to defendants.

C. Creating such intense pressure to settle is particularly unjustified in a case such as this one, in which the plaintiffs are seeking substantial monetary damages. A denial of class certifi-

cation would not prevent named plaintiffs from having their day in court; thus, there is no social benefit that balances out the harm to defendants caused by certifying this class action.

III. Erroneous certification of a class, by contrast, has severe consequences beyond any particular litigation. Adopting lax standards for certification imposes substantial and unnecessary burdens on the judicial system. It harms many companies doing business in the United States, by putting them at a competitive disadvantage with their competitors who conduct the same business without exposing themselves to the U.S. legal system. And, ultimately, it harms the American consumer.

ARGUMENT

I. THE RULE ADOPTED BY THE SECOND CIRCUIT MAJORITY RESULTS IN THE ERRONEOUS CERTIFICATION OF CLASS ACTIONS, WHICH IN TURN COMPELS DEFENDANTS TO SETTLE

A. The Second Circuit's Rule Results In the Almost-Automatic Certification of Class Actions

Without question, the majority opinion favors the party seeking certification. According to the majority, in deciding whether a purported class action meets the requirements of Rule 23(b)(3), the district court has no power to "weigh conflicting expert evidence" (Pet. App. 12a) if that evidence may bear on the merits. Instead, "[t]he question for the district court at the class certification stage is whether *plaintiffs'* expert evidence is *sufficient* to demonstrate common questions of fact warranting certification of the proposed class, *not whether the evidence will ultimately be persuasive.*" *Ibid.* (emphasis added).[3] Similarly,

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[3] "[U]ltimately * * * persuasive" to whom?, one must wonder. In cases such as this one, in which the very detailed expert testimony bore *entirely* on the Rule 23 issues, and subsumed the underlying antitrust merits *only* to the extent relevant to Rule 23, there will never be a reason to place that testimony before any finder of fact other than *the judge deciding the Rule 23 issue itself.*

the majority opinion does not require the district court actually to determine how a case will be tried on a class-wide basis; instead, the majority took refuge in the possibility that the district court might, at a later date, take some action to make the class manageable. *Id.* at 22a-23a. By refusing to "face[] and squarely decide[]" "tough questions" that stand in the way of class certification (*West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)), the Second Circuit has created a system by which plaintiffs' classes will be certified regardless of whether they are appropriate for class treatment.

The majority opinion permits plaintiffs to manipulate the outcome of a class certification decision. Obtaining a certification order is as easy as artfully drafting a complaint (the merits of which the court will not analyze) and hiring an expert (whose opinion the court will not challenge if it crosses a threshold so low as to be indistinguishable from mere admissibility). Certification without resolving a "clash" between each side's experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938; see also *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 348 (2001) ("Certifying a class on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys * * *.").

Such a permissive approach to class certification results, of course, in certification of classes that would *not* be certified if the court actually resolved all the Rule 23 issues – classes, for example, that are not manageable or in which common claims do not predominate. In one recent article criticizing the Second Circuit's approach, the authors emphasized:

> The practical result [of this rule] is to insulate almost any expert's statistical evidence from challenge at the certification stage and virtually guarantee plaintiffs' success in establishing certification requirements when they depend on such evidence. * * * This is a prescription for high error risk and a strong inducement to frivolous class action suits.

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1252, 1326-27 (2002).

The risk associated with this approach is compounded by the frequency with which courts use this approach to grant certification. Since the Second Circuit first announced that it would not permit the resolution of a dispute between experts on a motion for class certification in *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), at least eight district courts within the Second Circuit (including the district court below) have cited *Caridad* in rejecting a challenge to class certification. See Bone & Evans at 1320 (collecting cases).[4] *Caridad* has also been followed by district courts in other circuits. See, *e.g.*, *DeLoach* v. *Philip Morris Cos.*, No. 1:00CV01235, 2002 WL 559453, at *13 (M.D.N.C. Apr. 3, 2002) (in certifying class, declining to resolve dispute between experts). Moreover, just as the Second Circuit did here, numerous other courts have certified class actions without resolving, let alone meaningfully addressing, potentially crippling challenges to class certification. See, *e.g.*, Pet. 14, 17 n.2; *DeLoach*, 2002 WL 559453 at *17 (certifying class of "hundreds of thousands" without addressing how case would be tried). Thus, the risk of erroneous certification is not confined to this case, or even to the Second Circuit.[5]

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[4] The Bone & Evans article focuses on the opinion in *Caridad*, which the *Visa* majority opinion cites extensively. The article also criticizes the *Visa* majority for "refus[ing] to resolve a critical dispute between experts." Bone & Evans at 1257 n.12. The authors disclose that one of them worked on both *Caridad* and *Visa*. *Id.* at 1321 n.246.

[5] Nor is the risk confined to antitrust cases. *Caridad* was an employment discrimination case. *Szabo* was a product liability case. *West* was a securities case. Mass tort cases present (along with antitrust cases) perhaps the greatest threat of all. See George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997).

B. Certification of a Class Action Coerces Settlement

1. The certification of a class is hugely consequential for the litigants. Once a class is certified, defendants, who might otherwise have been willing to contest the case on its merits, almost always feel compelled to settle. As this Court has noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). That concern was echoed by the dissent below: "[C]lass certification 'places inordinate or hydraulic pressure on defendants to settle * * *.'" Pet. App. 35a (quoting *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001)). "No doubt, true 'death knell' cases are few; and a reviewing court must be wary lest the mind hear a bell that is not tolling. But in this case — in which the aggregated and trebled claims of the four million class members are alleged to top $100 billion — a carillon is in full peal." Pet. App. 35a-36a. (internal quotation omitted).

The statistics demonstrate that the courts' concerns are well founded. A 1995 study of more than 400 class actions brought in four U.S. districts showed that every single one in one of those districts, the Southern District of Florida, settled. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 184 tbl. 40 (1996). Most of the cases in the other three districts — anywhere from 62 to 88 percent — also settled. *Ibid.* Other empirical studies have produced similar results. See Bone & Evans at 1285 n.129, 1291-1292 (collecting authorities and noting that class action settlement rates exceed those for civil litigation generally).

How could the case be otherwise? The most readily apparent (and widely cited) reason for settlement is that defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc*, 51 F.3d at 299. But there are other reasons. Defending a class action can be vastly more expensive

than defending an individual action. For example, where (as here) there are affirmative defenses such as failure to mitigate damages, the defendant must take discovery from each class member to prepare its case. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 417 (Winter/Spring 2000) (discussing increased costs associated with litigating class action). Thus, not only is the risk of losing at trial magnified, so is the cost of getting there.[6]

Moreover, there are substantial costs to a defendant's reputation associated with defending a class action. See, *e.g.*, *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999) (describing negative publicity resulting from class action). Additionally, a company's stock price often will drop on word of a class action's being filed or certified. See, *e.g.*, Statement of F. James Sensenbrenner to U.S. House of Representatives, Mar. 13, 2002 (www.house.gov/judiciary/news0313.htm) (Sensenbrenner Statement). And class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant. As one witness testified before an Advisory Committee, explaining her own experience in trying a mass tort class action:

> [T]he playing field changes dramatically when there is a class certified. All the rules are different. * * * For each plaintiff who may have been in a different period of time, with different facts in a single trial, much of the evidence would not come in to that particular plaintiff, that particular claim. Everything gets mixed together.

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[6] The cost of complying with an order imposed by a class action, particularly a nationwide class action, also may be prohibitive. For example, life insurers (many of whom are members of *amicus* ACLI), are regulated on a state-by-state basis. A rule imposed by a court in one State may conflict with regulatory requirements in another State, thereby putting the defendant in a position where it cannot satisfy both a court order and state regulators.

III WORKING PAPERS OF THE ADVISORY COMMITTEE ON PROPOSED AMENDMENT TO CIVIL RULE 23 pt. 3, 107-108 (1997); see also *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Aggregation of claims also makes it more likely that a defendant will be found liable * * *.") (citations omitted).

In sum, the Second Circuit's rule, which refuses to resolve issues critical to the Rule 23(b)(3) analysis if they are related to the merits, and which allows real manageability issues to be swept under the rug, leads to coerced settlements.

2. Because of the intense pressure to settle, defendants can take little comfort in the majority's assurances that changes to the class might be made later. According to the Second Circuit, there is no real error in the district court's failure to decide, *before certifying the class*, how this case could be tried on a class-wide basis. Instead, in the eyes of the majority, it is sufficient that "[t]he [district] court specifically recognized its ability to modify its class certification order * * * or even decertify the class." Pet. App. 23a. But a class, once certified, is rarely modified or decertified. Indeed, in the 1995 study of class actions, certification decisions were altered in fewer than two percent of the cases. WILLGING ET AL. at 180, tbl. 32.

In the words of the dissent, "[c]onditional certification is not a hedge against present error." Pet. App. 42a. Once the class is certified, "plaintiffs and their counsel * * * have in hand the means to extract a favorable settlement of what may be weak claims." *Ibid.* (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). And, because certification decisions are rarely revised or reversed, plaintiffs never lose this leverage.

II. COERCED SETTLEMENTS THROUGH ERRONEOUS CERTIFICATION OF CLASS ACTIONS CREATE REAL BURDENS FOR LITIGANTS

According to one world view, a class certification decision is a mere preliminary stage of the case, neither the occasion for consideration of the merits nor particularly important to the out-

come of the case. That is the Second Circuit's apparent view. It also is a view that implies that erroneous class certification decisions, even erroneous class certification rules that create inconsistency among the circuits, are not the kind of urgent matter that requires this Court's attention. It is an utterly wrong view.

Legal rules that are biased in favor of class certification thwart the purpose of the 1998 amendments to Rule 23, which recognized the vital importance of the certification decision. They also force defendants to pay substantial sums to settle cases that are objectively meritless. Moreover, with regard to class actions claiming significant monetary damages (such as this one), a refusal to certify the class would result in no unfairness to plaintiffs — the titanic negative consequences of an erroneous certification decision are completely unnecessary.

A. The Majority Opinion Undermines a Goal of the Amendments to Rule 23

The Advisory Committee on the proposed amendments to Rule 23 recognized that "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23, Advisory Comm. Notes. To alleviate this concern, subsection (f) was added to Rule 23. It gives parties the opportunity to appeal a class certification decision.

Testimony before the Advisory Committee established that the availability of direct appeal was necessary to allow defendants to avoid the burdens of erroneous certification. One witness testified that Xerox Corporation had been a defendant in an antitrust class action that was certified notwithstanding plaintiffs' failure to show that they could establish the fact of injury through common proof. II WORKING PAPERS at 493. Although the court of appeals was "not convinced that the * * * class of plaintiffs will ultimately be able to sustain its burden to prove classwide impact from the alleged monopolization and tying practices of Xerox" (*id.* at 495), it denied Xerox's petition for mandamus because of the extraordinary nature of the mandamus

remedy. *Id.* at 495-96. Xerox, therefore, "was bludgeoned by an erroneous court ruling into settling" (*id.* at 492), a result that the company believed could have been avoided had an appeals court had the power freely to review the district court's decision. *Id.* at 494.

Just like the district court in the Xerox example above, neither the district court nor the majority opinion below was convinced that damages from the defendants' alleged tying practices could be established on a class-wide basis. Pet. App. 20a-21a, 90a-91a. The district court conceded, in fact, that its result might be different if it were allowed to determine which opinion was more persuasive. Pet. App. 97a. Nonetheless, the Second Circuit eschewed a "rigorous analysis" of the Rule 23(b)(3) elements, in favor of a rule doling out class certification so long as a plaintiff plays its cards right. The opportunity given by Rule 23(f) to correct errors by appealing becomes virtually meaningless if the court of appeals looks only to the sufficiency, not the persuasiveness, of the plaintiffs' expert testimony. In the words of the dissent, settlement "will be coerced by abuses that Rule 23(f) was specifically designed to correct." Pet. App. 55a.

B. By Permitting Erroneous Certifications, The Second Circuit Rule Forces Defendants to Settle Suits That Have No Merit

Certification of a class action forces a defendant to settle, even if the claim has no merit. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc*, 51 F.3d at 1298 (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). As one commentator explained: "[C]lass certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *." Bartlett H. McGuire, *The Death Knell*

for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 F.R.D. 366, 370-71 (1996).

The courts' and commentators' concerns derive from real-world experience. One example is the Agent Orange litigation. Beginning in the late 1970s, veterans of the Vietnam War filed lawsuits — heard, like the case below and like the recently filed slavery "reparations" cases, in federal court in Brooklyn — against chemical companies alleging that their exposure to a herbicide manufactured by the defendants caused various health problems. *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp. 1223, 1228 (E.D.N.Y. 1985). Over defendants' objections, the district court certified a multi-national class of persons. *Id.* at 1229. Faced with the risk that a jury could find for plaintiffs, defendants settled the case for $180 million. See *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145, 151 (2d Cir. 1987). Yet the plaintiffs' claims were so weak that the district court eventually granted summary judgment in favor of defendants on the claims of the plaintiffs who opted out of the class. See 611 F. Supp. at 1264.

Of course, the receipt of a large settlement for a meritless claim only encourages other plaintiffs, or plaintiffs' lawyers, with dubious claims to bring suit — and funds the same lawyers to pursue other class actions. "A lack of attention to the merits makes the class action an attractive vehicle for frivolous suits." Bone & Evans at 1303. Thus, not only does certification of a dubious class action generate a settlement that far exceeds the merits of the claim, but also the pattern of certification of these class actions increases the likelihood that additional groundless lawsuits will be filed and that the cycle will start over again. As one legal scholar has noted:

> It is surely a curious circumstance in a country committed to the rule of law to accept the propositions (1) that class certification alone creates negotiating power, (2) that that power leads to actual settlements, sometimes large dollar settlements, and simultaneously, (3) that this great negotiating power can be created without any judicial review of a

claim on the merits and, in some cases, any merit to the claim.

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997).

C. Plaintiffs Would Suffer No Negative Consequences from a Refusal to Certify

The substantial burden to a defendant resulting from the erroneous certification of a class action is exacerbated by the fact that, in many cases, plaintiffs would not be hurt by a failure to certify the class. The riskiest cases for defendants, of course, are those with the highest potential liability. Quite often, the potential liability is so high because every plaintiff is entitled to substantial damages. But, because each plaintiff is entitled to a significant recovery, the plaintiff will not suffer by a refusal to grant certification. The plaintiff can simply maintain the action as an individual action.

Take this case. A denial of class certification certainly would not prohibit named plaintiff WalMart from pursuing its claims individually. As the dissent noted, "if named plaintiff WalMart Stores processed even 10% of its sales with credit and off-line debit, and if it established an (average) one-half percent overcharge on those transactions, its claim would reach a quarter billion dollars (with trebling and before attorneys' fees) for 1999 alone." Pet. App. 43a.[7] "When class members have enough at stake to justify litigating individual suits, an erroneous denial of certification does not prevent enforcement of substantive law." Bone & Evans at 1305.

Indeed, the widespread certification of tremendously complex class actions appears to go far beyond what was envisioned by the drafters of Rule 23(b)(3). "While the text of Rule

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[7] It may be the case that certain smaller retailers do not have a sufficient financial interest to pursue their claims individually, and would need the benefit of a class action. That class, however, is not the class that plaintiffs sought to certify.

23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997). WalMart — the number-one company in the latest "Fortune 500" list — and four million other businesses hardly meet that description.[8]

In sum, in cases in which many, if not all, plaintiffs have a sufficient financial interest to litigate each claim individually, the circumstances by which defendants are coerced into settling can be avoided, with little cost to plaintiffs. But the Second Circuit has adopted a rule that ensures the opposite result.

III. CERTIFICATION WHERE IT IS NOT WARRANTED CREATES UNWANTED CONSEQUENCES BEYOND THE SPECIFIC LITIGATION AT ISSUE

The practice of loosely certifying class actions — a practice adopted *de jure*, not just *de facto*, by the Second Circuit's legal rules requiring acceptance of plaintiffs' expert testimony in almost all cases and allowing all serious inquiry into manageability to be deferred — has negative consequences far beyond any particular erroneous certification decision.

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[8] It is not unusual to see Fortune 100 companies — with their attractive "deep pockets" — named as class-action *defendants*. But in this case, three of the nation's 50 largest businesses as categorized by *Fortune* are named *plaintiffs*: WalMart (#1), Sears Roebuck (#32), and Safeway (#45). Whether such a gargantuan industry-versus-industry lawsuit has anything to do with the purposes of Rule 23 at all is open to question, but certainly at a minimum such a lawsuit called for especially careful scrutiny from the Second Circuit and calls for especially careful scrutiny from this Court. But instead the Second Circuit insisted that certification was proper as long as the plaintiffs have "'a reasonable probability'" or a "'colorable method'" or a method that is not "'so insubstantial as to amount to no method at all'" for establishing their claims by common proof. Pet. App. 11a-12a.

Widespread certification of class actions, without regard to whether these cases are appropriate for class treatment, has led to the (accurate) perception that class actions are out of control. A 1999 study based on a survey of Fortune 500 companies estimated that, in the decade between 1988 and 1998, the number of class actions rose by 338 percent in federal courts and by more than 1000 percent in state courts. *High Flyers*, Editorial, WALL ST. J., June 26, 2000, at A46. The dramatic increase in the number of class actions filed derives from all kinds of class action litigation, from mass torts to securities fraud to consumer fraud. See Michael A. Pope, *Mass Tort Cases Are Swamping Courts*, NAT'L L.J., Oct. 11, 1999, at B14 (mass torts); Tamara Loomis, *Securities Fraud: Lawyers Seek Review of a Key Class Action Ruling*, N.Y.L.J., Oct. 26, 2000, at 5 (securities fraud); Richard B. Schmitt, *Stronger Role Is Urged for Judges In Class Actions*, WALL ST. J., Nov. 1, 1999, at B5 (consumer fraud). This explosion has negative consequences for the courts, for business, and for consumers.

1. An increase in the number of class actions filed increases the burden on the courts. For the most part, class actions are extremely complex. Particularly with regard to mass tort and antitrust class actions where the damages calculation varies greatly from plaintiff to plaintiff, the court's workload is dramatically increased. Here, for example, rather than preside over the proof of damages claimed by a handful of plaintiffs, the court will be forced to preside over the individualized damages evidence of thousands, or even millions, of plaintiffs. Pet. App. 40a-41a; see also *id.* at 39a ("[E]ven if each merchant's claim took no more than a half a day to sort out, the damages phase of trial would last as long as the whole course of Western civilization from Ur."). The only way out is settlement, but settlement "will be coerced by abuses that Rule 23(f) was specifically designed to correct," Pet. App. 55a, and lucrative settlements invite the filing of more massive class actions. Courts, therefore, are the first victim of the proliferation of class actions.

2. Businesses operating in the United States (whether headquartered here or abroad) also suffer adverse consequences from the proliferation of class actions. Of course, a business that is named as a defendant in a class action incurs all of the many attendant burdens: risk of liability, coerced settlement, drop in stock price, and injury to reputation. Even more fundamentally, however, businesses must deal with the risk of being named in a class action. With regard to many goods sold abroad, U.S.-made products are necessarily more expensive than foreign-made products because firms operating in the United States must build the cost of liability insurance and risk into the product, costs not shared by foreign competitors. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 229-230 (1st ed. 1990). Moreover, even with regard to many goods sold in the United States, American companies bear U.S. liability costs on their start-up development and production. On the other hand, "[f]oreign companies can * * * move into the U.S. market at the margin, when the product is mature enough to make exact warnings possible and insurance affordable." *Id* at 230. By bearing the costs of the *risk* of being sued, even if they are never named in a class action, companies (including non-U.S. companies) doing business in the United States become victims of the class action boom.

3. So are the U.S. capital markets. Class action litigation is, for the most part, a U.S. phenomenon. See, *e.g.*, *Laptop Illogic*, Editorial, ASIAN WALL ST. J., Nov. 4, 1999, at 12 ("America's reputation as the land of lawsuits just got a lot worse."). Not surprisingly, many non-U.S. companies are wary of doing business in a jurisdiction with such a substantial risk of liability. "The initial reaction of the foreign businessman or lawyer to the threat of US jurisdiction is to throw up his hands in horror." Richard Wiseman, *What to Tell Your Foreign Client*, INT'L COM. LITIG., May 1, 1999, at 33.

Many non-U.S. companies therefore look for ways to avoid facing the liability associated with U.S. class actions. Foreign issuers are "deter[red] from raising capital or listing securities

in the United States" because they do not want to "subject themselves to broader civil liability under the antifraud provisions of the securities acts and other U.S. class action suits." Michael A. Schneider, *Foreign Listings and the Preeminence of the U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 315-316 (1994). According to one international practitioner, an in-house lawyer at Shell UK Limited, "The best advised corporations will arrange their affairs to ensure either that they * * * conduct their business through a truly autonomous affiliate whose business arrangements both on paper and in practice avoid its becoming the alter ego of a deep-pocketed parent or sister company." Wiseman at 33. Or "[t]here is an alternative strategy for foreign defendants. That is to ensure that they have no assets in the US * * *." *Ibid.* In other words, some foreign companies are being advised — and are no doubt following this advice — to keep their assets out of the United States to avoid paying big-dollar judgments. This hurts the U.S. capital markets, which may be deprived of substantial foreign investment, and the free flow of international trade.

4. Finally, the U.S. consumer bears the cost of the proliferation of class actions. Certainly, as a class member, a consumer may get some benefit from a particular class action. But cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 338 (1980) (noting frequency with which class actions do not provide real benefits to clients). But consumers lose the benefit of new technologies and products that class action liability deters.

The threat of large liability will deter a company from marketing a new product. The story of the prescription drug Bendectin proves this point. Bendectin was once marketed for the treatment of the side effects of pregnancy. Although Bendectin was never proven to cause medical defects, lawsuit after lawsuit was filed alleging that it did. The drug's manufacturer eventually "decided to set a limit on its liability by removing Bendectin from the market." Louis Lasagna, *Chilling Effect of Product Liability*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW

ON SAFETY AND INNOVATION 334, 340 (Peter W. Huber & Robert E. Litan eds., 1st ed., 1991). The result: "It seems safe to predict that never again will a manufacturer petition the FDA to approve for marketing a new prescription drug" for the side effects of pregnancy. *Id.* at 341. Companies "adjust[] to the threat of liability by doing less. *Not* innovating is a remarkably easy thing to do." HUBER at 155 (emphasis in original).

The risk of companies refusing to innovate for fear of liability has been recognized in the class action context:

> Because potential liability of a class action is so enormous and unpredictable under the current system, most defendants are willing to settle regardless of merit. The cost is then passed off to the American consumer in the form of higher prices for goods and services.

Sensenbrenner Statement, *supra.* Ironically, class actions — often brought in the name of the American consumer — end up harming one of the constituencies they are intended to protect.

In short, erroneous certification of class actions, and the resulting explosion of class action litigation, harms both litigants and non-litigants. By ensuring that class actions are being erroneously certified, the Second Circuit's opinion contributes to this enormous problem.

This Court has a particular responsibility to resolve mature and important circuit conflicts over interpretation of the Federal Rules, because the Court shares responsibility with Congress for such rules. The present case presents such a conflict over an issue whose implications are important, in the setting of a case that is itself highly consequential, high-stakes litigation. The Court should not let pass this opportunity to bring order and rationality to an area that, *amici* submit, is spiraling out of control.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
Petitioners,

v.

WALMART STORES, INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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RULE

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Virtually every argument in the opposition brief reduces to two points: that petitioners had a full, rigorous review of the merits of the class certification motion in this case and lost, and that "[t]his case does not present any conflict among the circuits" on the "proper standards for evaluating class certification evidence." Opposition ("Opp.") at 2. As we show *infra*, this argument treats as irrelevant the Second Circuit's articulation of its very lenient standard for assessing class certification motions under Rule 23(b)(3) and pretends that the courts below applied a standard different from the one set forth in their opinions. In fact, the lower courts plainly identified the legal rule that governed their assessment of the record on class certification; that rule conflicts with the rule adopted in other courts of appeals; and the petition properly seeks review of that rule and resolution of that conflict.

Specifically, the Second Circuit held that a district court is barred from resolving competing expert submissions on class certification issues overlapping with the merits of a case and may certify a class as long as the plaintiffs present merely admissible evidence in support of the Rule 23(b)(3) prerequisites. The court also authorized the postponement of the determination whether a class action is manageable despite identified problems with the management of individual class members' damage claims. Applying this relaxed standard, the court found that plaintiffs' expert's submission in support of class certification was not fatally flawed and certified a class of four million plaintiffs seeking damages of $100 billion.[1]

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[1] Respondents assert that petitioners "invented" the $100 billion damages figure "for its apparent shock value." Opp. 4 n.2. That contention is contradicted by the report of Respondents' own expert economist. Fisher Report at 123 (Apr. 4, 2000); Fisher Rebuttal Report at 51 (Apr. 26, 2000). Petitioners cannot quote Dr. Fisher's precise numbers, because Respondents have designated both Reports "Highly Confidential" under the protective order entered by the district court.

Because respondents wish away the Second Circuit's holding, they do not confront the serious nature of the conflicts raised by the Petition, nor do they even address petitioners' demonstration that the issue presented is both recurring and vitally important to the fair and just administration of civil litigation. Even respondents do not dispute that class certification has a coercive effect on defendants that is unrelated to the merits of their defense. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Indeed, certification in this case is "brutally coercive" because of the size of the class and the damages asserted. See Pet. App. 36a. Nor do respondents contest the importance of the fair and uniform administration of Rule 23 to civil litigation and to affected classes of plaintiffs and defendants. It is no exaggeration to say that a class certification can result in financial devastation for employers, industries, and entire segments of the economy and alter policies and practices whose legality has never been adjudicated. See Br. of the American Bankers Ass'n; Br. of the Alliance of Auto. Mfrs. This Court should grant review to ensure that Rule 23, which it promulgated, is correctly and fairly interpreted and applied.

Petitioners address in turn each of respondents' attempts to divert attention from the class certification holding that warrants this Court's review.

1. In this case, the district court and the Second Circuit clearly articulated the legal standard for assessing a motion for class certification, and applied that lenient standard in granting the motion for certification. Respondents now claim, however, that although the courts below specified a standard in which the resolution of evidentiary conflicts is prohibited (or at least unnecessary), the courts nonetheless conducted the "rigorous" or "exhaustive analysis" required by Rule 23(b), rather than applying the deferential standard articulated in the opinions. Not only is that improbable on its face, it is belied by the language of the decisions below.

In support of the motion for class certification, respondents' expert, Professor Carlton, submitted declarations stating his belief that the facts necessary to establish a classwide recovery could be proven. In response, petitioners' expert, Professor Schmalensee, submitted a declaration explaining the numerous, improbable assumptions on which Professor Carlton's theory of classwide injury rested. Respondents spend substantial time and energy attacking Professor Schmalensee and discussing the relative merits of the two experts' positions. This effort entirely misses the point.

The legal issue presented by the petition is not which expert is ultimately right about the merits of respondents' antitrust claims but, instead, the appropriate standard for deciding class certification motions under Rule 23(b)(3).[2] Here, despite the fact that the expert declarations were addressed solely to Rule 23 issues, the district court and the court of appeals both concluded that they were *forbidden* to decide which expert was correct on the Rule 23 issues at this stage of the proceedings. Instead, the courts below decided that Professor Carlton's submission that the Rule 23 prerequisites could be met was not "fatally flawed" and, thus, the class had to be certified. Pet. App. 11a.

The district court first explained that "a 'weighing of the evidence is not appropriate at [the class] stage of the litigation." Pet. App. 87a. Indeed, the court stated that it was not "the 'trier of fact'" and that it was "expressly forbidden" at the class certification stage to "delve into the merits of an expert's opinion, or indulge 'dueling' between opposing experts." *Id.* at 68a (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Caridad* v. *Metro-North Commuter*

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[2] Respondents also irrelevantly assert that no other payment networks impose requirements similar to the Honor All Cards rule. Opp. 5. This assertion is fully refuted by the record evidence concerning, for example, American Express and regional ATM networks. *See* J.A. at 784-85, 793-96, 797-99, *In re. Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (No. 00-7699) ("*Visa Check*").

R.R., 191 F.3d 283, 292 (2d Cir. 1999)).[3] Thus, the district court held that it had to certify the class if the "'assertion of class status is at least colorable,'" Pet. App. 87a, and even if "factual or legal underpinnings of the [class certification] are undermined once they are tested under a more rigorous standard than *Caridad* allows," *id.* at 97a.

The Second Circuit affirmed the legal standard for assessing class certification evidence employed by the district court. The court admonished that a motion for class certification is "not an occasion for examination of the merits of the case," but rather is only to "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." Pet. App. 11a. See also *id.* at 11a-12a (authorizing class certification if plaintiffs have "'a reasonable probability'" or a "'colorable method'" or a method that is not "'so insubstantial as to amount to no method at all'").

There is no doubt that the district court addressed various issues raised in the Schmalensee report. But, equally plainly, the court viewed that "evidence" and the issues it raised through the prism of the restrictive legal standard it considered itself bound to apply. The Second Circuit held that this was the *correct* approach. In the face of those clear articulations, respondents' suggestion that the courts actually applied some different standard or approach is untenable.

In sum, respondents cannot magically make the legal standard articulated and applied by the courts below disappear. The Second Circuit has established a lenient, incorrect legal standard and applied it to this case. If, as we show *infra*, that holding conflicts with the standard established and applied in other circuits, then the petition should be granted.

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[3] *See also* Pet. App. 69a n.6 (a "lengthy, substantive critique of the findings of the plaintiffs' expert" is "not permitted in this circuit on a motion for class certification") (citing, *inter alia*, *Caridad*, 191 F.3d at 292).

2. Respondents' second argument – that the decision below does not conflict with the decisions of other circuits – also rests on the erroneous premise that the Second Circuit did not apply its articulated standard for assessing evidence of the prerequisites for class certification. Any fair minded reading of the opinion below compared to those issued by the Seventh, Third and First Circuits plainly shows that fundamentally different legal standards are applied in different parts of the country in deciding class certification.

Respondents' attempt to distinguish *West* v. *Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002), is particularly unavailing. In that case, far from resting on "an empty factual record," Opp. 17, the district court granted class certification because "each side ha[d] the support of a reputable financial economist . . . and [the court] thought the clash enough by itself to support class certification and a trial on the merits." *West*, 282 F.3d at 938. The Seventh Circuit reversed that decision, stating that "[a] district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits." *Id.* It is irrelevant that the district court in *West* wrote a short opinion, while the district court here wrote 15 pages, Opp. 18, before declining to decide whether plaintiffs' expert had actually demonstrated that common issues would predominate. The critical point is that, in the Seventh Circuit, under Rule 23(b)(3), "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," *West*, 282 F.3d at 938. In contrast, in the Second Circuit, the tough questions can be ducked, and a class may nonetheless be certified.

Respondents also breezily dismiss other conflicting court of appeals' decisions as standing only for the proposition that a court may go beyond the pleadings in deciding whether to certify a class under Rule 23(b)(3). See Opp. 18-19 (citing

cases discussed in the Petition at 15-17).[4] These decisions are all consistent with that proposition, but they also establish a standard for assessing class certification evidence that simply cannot be reconciled with the Second Circuit's legal analysis. In *Szabo* v. *Bridgeport Machines, Inc.*, for example, the court explained that "if some of the considerations under Rule 23(b)(3) . . . overlap the merits . . . then the judge must make a preliminary inquiry into the merits" and "resolve the dispute before allowing the case to proceed." 249 F.3d 672, 676-77 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001). In each of the other cited decisions, too, the court of appeals has mandated "'whatever legal and factual inquiries are necessary under Rule 23.'" See Pet. 16-17. There is plainly a broad conflict among the courts of appeals on the recurring and important question of the appropriate standard for assessing class certification evidence.

3. Respondents assert in passing, Opp. 21, that, in the courts below, petitioners did not contend that a court deciding a class certification motion had to resolve all factual and legal questions necessary to determine whether the prerequisites of class certification exist. This contention, which is based on snippets in pleadings taken out of context, is flatly contradicted by petitioners' consistent arguments below that

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[4] Respondents also argue that the Second Circuit's decision could not conflict with decisions of the Seventh and Third Circuits, because district courts in the latter circuits have cited the district court decision in this case with approval. *See* Opp. 20. The best way to determine whether courts of appeals' decisions are in conflict is to read the decisions themselves, which, as we have shown, adopt wholly inconsistent standards. Respondents' further citation of district court decisions refusing to resolve a "'battle of the experts'" at the class certification stage, *id.* at 20-21, simply illustrates the breadth of the conflict and the vastly differing approaches courts take to certification. *See also* Pet. 17 n.2. Particularly given that class certification decisions take place at the district court level and, even now (under amended Rule 23(f)) are not routinely reviewed, the pervasiveness of the conflicts in approach underscores the need for this Court's review.

the judge must decide whether plaintiffs have *proven* the facts essential to class certification.[5] The question of the appropriate standard for assessing class certification evidence is plainly presented by the decision below.

4. Based on the faulty premise that there is no conflict among the courts of appeals on the standard for assessing class certification evidence, respondents also incorrectly assert that petitioners' unstated agenda must be to overturn *Eisen* v. *Carlisle & Jacquelin*. That is untrue. What we urge the Court to do is to eliminate confusion among lower courts concerning the proper meaning of *Eisen*, and its relationship to this Court's other class action decisions requiring "rigorous analysis." See *General Tele. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982); *Coopers & Lybrand*, 437 U.S. at 473.

On the one hand, *Eisen* holds that courts may not decide the merits of a suit in order to determine whether to certify a class. 417 U.S. 156, 177 (1974). Indeed, respondents implicitly concede that many district courts have misinterpreted *Eisen* by holding that in the class certification context, it bars decision of any factual or legal question that overlaps with a merits determination. See Opp. 22; Pet. 18-20. On the other hand, this Court's decisions in *Falcon* and *Coopers & Lybrand* require district courts to conduct a "rigorous analysis" before certification. The language of Rule 23(b), which requires a court to "find[]" that Rule 23(b)'s

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[5] *See, e.g.*, Pet. for Reh'g & Reh'g En Banc at i, *Visa Check*, 280 F.3d 124 (2d Cir. 2001) (No. 00-7399) (raising the following points for review: "In Passing Upon A Motion For Class Certification, It Is Improper For The Trial Court To Accept The Plaintiffs' Expert Report So Long As It Is Not 'Fatally Flawed,'" and "A Class May Not Be Certified Unless The Trial Court Is Able To Determine At The Time Of Certification That Each Of The Requirements Of Rule 23 Can Be Met Without Sacrificing Defendants' Substantive Rights."); Br. of Defs.-Appellants at 14-15, 17-18, 22-27, *id.*; Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 20, *Visa Check*, 192 F.R.D. 68 (E.D.N.Y. 2000) (No. CV-96-5238).

prerequisites have been met, Fed. R. Civ. P. 23(b), reinforces the rigorous nature of the class certification inquiry.

This Court, however, has not explicitly determined the *nature* of the rigorous judicial inquiry that is required or permissible where the legal and factual questions raised by a motion for class certification overlap with the merits of a case. Specifically, the Court has not decided whether the district court must, *as a trier of fact* for Rule 23 purposes, actually resolve factual and legal disputes presented by the Rule 23 criteria. Based on their differing readings of this Court's authority, the lower courts are confused and in conflict about the standard for assessing class certification evidence that overlaps with merits issues. See Pet. 18-20. The need for resolution of this important question that rests at the intersection of this Court's Rule 23 case law is another strong reason to grant the petition.

5. Finally, respondents have a single response to petitioners' demonstration that the Second Circuit's decision creates a conflict among the courts of appeals by its simultaneous certification of the class and postponement of serious and apparent manageability questions. They contend that there were no "existing and identifiable manageability problems" present in this case, Opp. 24 (emphases omitted), and that this fact distinguishes the instant case from those cited in the Petition at 20-22.

Unlike respondents, however, both courts below recognized that the class certification motion presented significant manageability questions. The district court recognized that merchants might have an obligation to steer customers away from using off-line debit cards in order to mitigate their individual damages and therefore that the four million class members' damages might have to be individually tried. See Pet. App. 91a-92a n.19 ("'[e]ven the necessity of individual trials on damages may be fatal if the class numbers in the thousands or millions'") (quoting 2 Areeda & Turner, *Antitrust Law* § 332c, at 157 (1978)). But, the district court

postponed determination of whether petitioners' mitigation defense would render the class action unmanageable and certified the class, holding that:

> It may well be appropriate to address before trial the merits of some of defendants' damages-related arguments, and whether, upon resolution of those issues, there remains a "practical means" to litigate the damage claims of class members. [*Id.* at 92a n.19.]

The court of appeals affirmed this analysis and decision, approving the postponement of decision on the manageability question. In dissent, Judge Jacobs opined that "[t]he manageability problem in this case has been 'apparent' from the outset and is apparent right now." Pet. App. 40a. See *id.* at 41a (reciting record evidence that shows the mitigation defense "may 'have force'" and stating that "[i]t makes no sense to provide individualized notice to millions of merchants before the court has devised a 'practical means' for trying the issues presented").

The courts below did *not* hold that the manageability issue raised by petitioners was unripe or speculative. Instead, they held that under Rule 23(b), the district court may postpone decision of serious manageability questions and still certify a class.[6] Thus, the actual holding of the courts below (as

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[6] Respondents also appear to contend that petitioners did not argue below that the ability of merchants to steer gave rise to individualized issues rendering the class action unmanageable. But petitioners consistently argued that merchants' ability to steer made individualized determinations of injury necessary. *See* Pet. App. 89a-90a. And, while the district court rejected the argument that steering could eliminate all of a merchant's damages, it acknowledged that the steering argument could "have force" as an argument for mitigation of damages and the necessity of individualized damages determinations. *Id.* at 90a-91a & n.19. This argument was clearly presented to and decided by the court of appeals. *See, e.g.*, Reply Br. of Defs.-Appellants at 21, *Visa Check*, 280 F.3d 124 (2d Cir. 2000) (No. 00-7699) ("[t]he district court acknowledged that individual damages issues might overwhelm common issues of liability and thus defeat certification"); Pet. App. 21a-23a. The question whether

opposed to the strawman set up in the opposition brief) conflicts with the language and structure of Rule 23(b), with this Court's decisions requiring a court to conduct a rigorous analysis to determine whether the prerequisites of class certification (including manageability) have been satisfied, and with the decisions of other courts of appeals. Pet. 21-22.

As the latter decisions show, where, as here, there are "serious problems [with class certification] now appearing, [the court] should not certify the class merely on the assurance of counsel that some solution will be found." *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc). After the petition in this case was filed, the Seventh Circuit reversed the certification of a nationwide class seeking damages based on the abnormally high failure rate of Firestone tires on Ford explorers, stating that, in light of the variable facts for individual plaintiffs' claims, "this litigation is not manageable as a class action even on a statewide basis." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, No. 02-1437 et al., 2002 WL 831990, at *4 (7th Cir. May 2, 2002).

Here, however, the district court impermissibly put the manageability requirement of Rule 23(b) to the side, stating that it would return to the question in the future. However, with a certified class of four million, someday may never come, notwithstanding petitioners' defenses. It is precisely for this reason that Rule 23(b) requires courts to enforce "actual, not presumed, conformance" with its prerequisites. *Falcon*, 457 U.S. at 160.

CONCLUSION

For the reasons set forth in the petition and in this reply, the petition for certiorari should be granted.

Rule 23(b)(3) authorizes a district court to certify a class while postponing a manageability determination is thus squarely presented by this case.

Respectfully submitted,

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